REPORTS OF CASES

DECIDED BETWEEN

MARCH 5, 1960 and AUGUST 19, 1960

IN THE

Supreme Court of Nebraska

JANUARY TERM 1960

VOLUME CLXX

WALTER D. JAMES

OFFICIAL REPORTER

GANT PUBLISHING COMPANY

LINCOLN, NEBRASKA

1961

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For the benefit of the State of Nebraska

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1960

EVELYN NATHAN, APPELLANT, V. BERNARD M. MCKERNAN ET AL., APPELLEES.
101 N. W. 2d 756

Filed March 11, 1960. No. 34558.

1. **Fraud.** The defense on the ground of fraud may be shown by parol, not to contradict or vary but to destroy the legal and binding effect of a written instrument.
2. **Actions: Limitations of Actions.** The defense of recoupment or reduction of plaintiff's claim must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations.
3. **Sales.** As a general rule there is an entire failure of consideration where the property is entirely worthless, but there is not entire failure of consideration if the property has any substantial value, although less than the consideration paid, as where, by reason of unsoundness or imperfection, it is merely diminished in value.
4. ———. Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action.
5. **Fraud.** The asking of a certain price for an item of property is not a representation of its value.
6. ———. A representation to be fraudulent must be made either with knowledge of its falsity or without such knowledge as a positive statement of a known fact.
7. ———. The rule is that fraud must relate to a present or preexisting fact and may not be generally predicated on a

representation concerning an event in the future or acts to be done in the future.

8. ———. Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry.

9. ———. A defrauded party must be diligent and prudent in his effort to detect the fraud and means of knowledge thereof are equivalent to knowledge.

10. Sales. In an action upon a contract for the sale of chattels, evidence by the purchaser that after the delivery of the subject matter he inspected, retained, and used it as a whole, shows both an acceptance and a waiver of any objection that the quality was not such as the contract required.

11. Fraud. A right of action for fraud may be waived. Thus, while the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the fraud, he cannot do so where, having full knowledge, he does an act or acts indicating his intention to waive the fraud.

APPEAL from the district court for Douglas County: JAMES M. PATTON, JUDGE. *Reversed and remanded with directions.*

Paul I. Manhart, for appellant.

Shrout & Brown, Collins & Collins, Abrahams & Kaslow, Finlayson, McKie & Kuhns, Francis A. McLane, and *Garrotto, Doerr & Nanfito,* for appellees.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

On March 2, 1956, plaintiff, Evelyn Nathan, filed a petition in the district court for Douglas County against defendant Bernard M. McKernan, his wife Margaret A. McKernan, and other named defendants, seeking foreclosure of a second mortgage alleged to have been duly executed and delivered to plaintiff by defendants McKernan on described real estate owned by them in Douglas County, the consideration for which was allegedly the sale by plaintiff to said defendants of a York-type locker plant in Bellevue, Nebraska. The

mortgage, dated November 14, 1951, was allegedly given to secure a promissory note of even date for $8,499, payable in nine annual installments of $850 each with interest at 4 percent commencing December 1, 1952, plus one final payment of $849 with interest at 4 percent on December 1, 1961. Both the note and mortgage, and also the bill of sale to the plant, executed by the parties and delivered to said defendants, contained an acceleration clause. Plaintiff alleged that no part of the principle and interest on the note and mortgage had been paid by defendants McKernan and that $8,499 with interest at 4 percent from November 14, 1951, plus $108 which plaintiff was obligated to and did expend to insure the mortgaged property in order to protect her interests, was due and payable to plaintiff by said defendants.

Admittedly, the real property was subject to a first mortgage in favor of defendant Packers National Bank, and defendant Gerald Nathan had a judgment lien which was prior to plaintiff's second mortgage. Admittedly, all other named defendants each had either a mortgage lien or a judgment lien on the property, each of which were allegedly junior and inferior to plaintiff's mortgage. Plaintiff sought to have defendants, other than defendants McKernan, set forth their respective liens, and prayed that defendants be foreclosed of all equity of redemption or other interest in said mortgaged premises, which should be sold according to law; that plaintiff should be adjudged the amount due her on said note and mortgage; and that she should be awarded a deficiency judgment against defendants McKernan for any amount thereof which remains unpaid upon applying the proceeds of the sale to the liens according to their determined priority, and equitable relief. In that connection, admittedly the judgment lien of defendant First National Bank of Omaha, of which defendant United States of America was assignee, and the judgment lien of defendant John M. Messner, had thereto-

fore been paid and satisfied in full. Also, plaintiff alleged that defendant C. A. Jenks, assignee, had a judgment against defendants McKernan and that said judgment was a lien on their real property for $64 costs and interest, which was junior and inferior to plaintiff's mortgage, but that the amount unpaid on said judgment was unknown. In that connection, defendant C. A. Jenks filed no pleadings and the trial court made no determination with regard to said lien, and no complaint is made here with regard thereto.

Defendant Packers National Bank filed an answer and cross-petition denying generally, except that after describing a note and mortgage on defendants' real property allegedly executed and delivered by defendants McKernan on March 10, 1947, and duly recorded, said defendant alleged that defendants McKernan were in default of certain payments as required; alleged that the whole amount unpaid was due and owing as provided by the acceleration clause of said mortgage; and prayed for foreclosure of said mortgage as a first lien, and for general equitable relief.

Defendant Gerald Nathan, assignee, filed an answer and cross-petition describing an unpaid judgment against defendant Bernard M. McKernan of which defendant Gerald Nathan was assignee. He alleged that said judgment was a second lien on defendants' real property, and prayed that upon a marshalling of liens, there should be a foreclosure of all equity of redemption or other interest in said property, which should be sold according to law; that out of the proceeds he should be paid the amount of his judgment, interests, and costs; and that if there was any deficiency, he should be given judgment therefor against defendant Bernard M. McKernan, and equitable relief.

Defendant Midwest Packing Company filed an answer and cross-petition denying generally, except that after describing a note and mortgage on defendants McKernans' real property allegedly executed and delivered

by them on February 15, 1952, and duly recorded, said company alleged that no part thereof had been paid and said defendants were in default; and prayed for an accounting of the amount due, foreclosure of said mortgage, and equitable relief.

Admittedly, one John Brinjak, doing business as Town and Country Heating Company, filed a petition in intervention claiming to have a mechanic's lien on defendants McKernans' real property, effective as of October 7, 1957, for $310.50, and interest, for which he prayed foreclosure and equitable relief.

Defendant Bernard M. McKernan filed an answer and counterclaim against plaintiff. He denied generally the allegations of plaintiff's petition and alleged in substance that the note and mortgage sought to be foreclosed were given for the purchase of a locker plant in Bellevue which was worthless; that said instruments were given without consideration; and that they had been fraudulently obtained by certain alleged material concealments and various alleged false representations made by plaintiff with regard to the condition, operation, and profits of the plant. Defendant then prayed for a dismissal of plaintiff's petition. As a counterclaim, said defendant included the allegations of his answer without repetition, and alleged that as a result of said alleged concealments and false representations, defendant was induced to quit his profitable employment as an automobile salesman in order to operate the locker plant, and was compelled to expend substantial sums attempting to repair the plant. He then prayed for $10,000 damages. Defendant Margaret A. McKernan also filed a comparable answer to plaintiff's petition and prayed for dismissal of plaintiff's petition.

Thereafter, plaintiff filed replies traversing defendants McKernans' answers and an answer traversing defendant Bernard M. McKernan's counterclaim, the affirmative material substance of which is hereinafter pointed out. Plaintiff also filed a reply to the answers,

and answers to the cross-petitions of defendants other than McKernan. Therein she denied generally but admitted that defendant Packers National Bank had a valid first mortgage lien on defendants' real property; that defendant Gerald Nathan, assignee, had a valid judgment lien thereon which was second in priority; that defendant Midwest Packing Company had a valid mortgage lien thereon but said lien was inferior to that of defendant Packers National Bank, Gerald Nathan, and plaintiff, which in effect would give defendant Midwest Packing Company a lien fourth in priority; that defendant Omaha Steak Company had a valid judgment lien thereon which, under the circumstances, in effect would give said defendant a lien fifth in priority; and that all of said defendants aforesaid were entitled to an accounting of the respective amounts due and unpaid, and to the equitable relief for which they respectively prayed. We find no merit in plaintiff's contention that she was entitled to judgment on the pleadings.

The record discloses that the cause was heard on the merits, whereat evidence was adduced by the parties and the cause was taken under advisement. Thereafter, a judgment was rendered which in substance refused foreclosure of plaintiff's second mortgage; ordered it stricken from the record; held it for nil; and cancelled plaintiff's note which the mortgage was given by defendants McKernan to secure. The judgment then dismissed said defendants' counterclaim about which no complaint is made in this appeal by cross-appeal, so it will not be otherwise discussed herein except to affirm such dismissal. The judgment then concluded that defendant Packers National Bank had a first mortgage lien on defendants McKernans' real property for $3,642.23 with interest at 4 percent from June 7, 1957, and ordered a foreclosure thereof as provided by law; and that defendant Gerald Nathan had a judgment lien on said property second in priority for the sum of $187 with interest and costs, in accord with the transcript of

said judgment on file. In that connection, no complaint is made here with regard to such portion of the judgment.

Thereafter, the judgment concluded that defendant Midwest Packing Company had a mortgage lien on defendants McKernans' real property for $1,699.27 with interest from October 25, 1957, which lien was *third* in priority; that defendant Omaha Steak Company had a judgment lien on defendants McKernans' real property for the sum of $79.01 with interest, which lien was *fourth* in priority; and that intervener John Brinjak, doing business as Town and Country Heating Company, had a mechanic's lien on said property for $310.57 with interest, which lien was *fifth* in priority; and ordered foreclosure, sale of the property, and equitable relief prayed by said defendants. No complaint is made here about conclusions reached in this paragraph except as to the italicized priorities of said liens, which, if plaintiff is entitled to the relief prayed by her, each should be found to be inferior to plaintiff's mortgage lien and respectively *fourth, fifth,* and *sixth,* in priority. As hereinafter observed, we conclude that plaintiff was entitled to such relief.

After plaintiff's motion for new trial, or in the alternative for judgment on the pleadings and evidence, was overruled, she appealed, assigning 43 alleged errors. Some 16 of such assignments related to claimed erroneous admissions of certain evidence which are disposed of, contrary to plaintiff's contentions, by Pierce v. Fontenelle, 156 Neb. 235, 55 N. W. 2d 658. As far as important here, the substance of all other assignments of error made by plaintiff is: (1) That the trial court erred in failing to sustain plaintiff's motion for judgment on the pleadings; (2) that the trial court erred in excluding certain evidence; and (3) that the judgment was not sustained by the evidence and was contrary to law. We sustain the last assignment.

Plaintiff's first assignment of erroneous exclusion of

evidence refers to the cross-examination of John Bressman, Jr., a witness for defendants McKernan, which allegedly appears in the bill of exceptions on pages 221 to 225, inclusive. In that connection, we find no exclusion of any evidence until pages 223 and 224 are reached. At that time, plaintiff offered two paragraphs in an affidavit made by the witness and delivered to plaintiff's counsel on August 21, 1957. The witness had denied that the second such paragraph truly reflected the facts, and such paragraphs were admitted without objection "for impeachment purposes," for which they were admissible. Plaintiff's second assignment of erroneous exclusion of evidence refers to the deposition of John Bowers, a refrigeration expert, read and offered by plaintiff and appearing in the bill of exceptions at pages 386 to 389, inclusive, and pages 394 to 399, inclusive. After careful examination of that portion of the record, we find that none of such evidence was eventually excluded. The answer to a question asked by plaintiff's counsel at page 401, which called for a "Yes" or "No" answer, which was answered as "Yes," was excluded after a general objection was made to the question. We think that the answer should have been admitted, but conclude that the exclusion was not prejudicial to plaintiff in any event because at page 432 another expert who originally installed the plant involved new in 1947 was permitted, over a like objection, to answer the same question in a more comprehensive manner favorable to plaintiff. We find no prejudicial error with regard to exclusions of evidence.

We turn then to the question of whether or not the judgment was sustained by the evidence or was contrary to law. In a determination of that question, the cause will be tried de novo in this court in conformity with the general rule reaffirmed in Town of Everett v. Teigeler, 162 Neb. 769, 77 N. W. 2d 467, and other applicable and controlling rules hereafter discussed.

The record is voluminous and we can only summarize

the material evidence. In doing so, Evelyn Nathan will be called plaintiff; Bernard M. McKernan and Margaret A. McKernan will be called defendants when referring to both; when referring to defendant Margaret A. McKernan separately, she will be designated by name; and when referring to defendant Bernard M. McKernan separately, he will be called defendant.

The locker plant was installed new by the York Corporation in 1947. Plaintiff purchased the plant in September 1948 for $10,000. In enlarging and remodeling the locker room a short time later, there was a leakage of ammonia from the pipes, which ordinarily are serviceable for many years. The reason for such leakage is not made clear, but it may be inferred that it was caused by some accidental means during the progress of such work. The condition was immediately remedied and there has been no leakage of ammonia since that time. In that connection, defendants contend that plaintiff failed to disclose that such leakage had occurred, and attempt to predicate fraud upon such concealment. We believe that such concealment was not material in point of time, but in any event the facts with regard thereto were generally known in the neighborhood, and defendants learned about such facts right after they took possession of the plant, began operation thereof, and continued to do so without any objection or complaint thereof made to plaintiff from November 16, 1951, to September 4, 1953.

The evidence discloses that plaintiff operated the plant successfully with two or three hundred customers until about July 20, 1949, when there was a fire in the locker room of the plant. As a result there was smoke damage and the beaver board which held the insulation in the ceiling pulled out through the nail holes caused by water sprayed thereon by the fire department. Also, water had accumulated in the basement where the motor and compressor were located on a cement foundation about 18 inches above the basement floor. The amount

of such water is in dispute as well as whether or not the plant was operating after the fire was put out. Be that as it may, there is competent expert evidence that in any event such water would damage only the electrical portion of such equipment which could be readily repaired. There is competent evidence that after the insurance companies had adjusted the fire loss and litigation had arisen with regard thereto in the district court for Douglas County, plaintiff and her employees cleaned up the plant, repaired the insulation, checked the equipment, put a new modern wooden ceiling in the plant, and plaintiff claimed that the plant was then in condition to be operated properly again. Also, there is competent evidence by an expert that the plant was in good working order as checked, oiled, and regulated by him as late as March 1951.

However, in the meantime, plaintiff had purchased such a plant at Fullerton, Nebraska, and moved there where her sons operated it. Therefore, she ceased to operate the plant here involved and put it up for sale after the fire and the plant had been cleaned and repaired. In that connection, defendants' contention is that plaintiff failed to disclose that such a fire had occurred and the extent of the damages caused thereby, and defendants attempt to predicate fraud upon such concealment. In such respect, plaintiff contends that she told defendants about the fire, and it is clear that it was well known in the neighborhood that such a fire had occurred. Defendants learned such fact right after they took possession of the plant, began operation thereof, and continued to do so without complaint or objection made to plaintiff from November 16, 1951, to September 4, 1953.

In July 1951, defendant was an automobile salesman for an automobile and garage firm in Omaha. He first met plaintiff in July 1951, when she came to said garage to have a car serviced. Defendants were anxious to get into business for themselves and defendant so in-

formed plaintiff, whereupon she told him that she had the locker plant here involved for sale; that it was a money-making business; and the only reason she was not operating it was that she had bought another plant at Fullerton where she then resided, and she had no one to manage the plant at Bellevue. Thereafter, plaintiff and defendants met some six different times between July 1951, and November 14, 1951, by prearrangement, and talked at length about defendants purchasing the plant. At one of such times defendants' lawyer was present, and upon another occasion defendants went out to the plant with plaintiff, where they were shown and inspected every part of it. At that time, as stated by defendant, the plant looked "bad" and "Actually, it looked crummy," but defendants claimed that plaintiff said she guaranteed the plant would work; that it was in good working condition and operated automatically on thermostatic impulse. Defendants noticed at that time that the lockers were chipped and rusted, but plaintiff said all they would have to do would be to put some paint on them and they would be all right, which defendants expected to do.

It was finally agreed that defendants would buy the plant from plaintiff for $8,500. In that connection, the plant was clear of encumbrances and plaintiff desired to take a mortgage back on the plant to secure defendants' note, but defendants, who were without any capital on which to operate the plant, wanted it to be without encumbrance, so they could obtain credit thereon in their business. Therefore, as proposed by defendants, plaintiff agreed to take a second mortgage on defendants' real property to secure payment of the purchase price of the plant. Thus, by prearrangement, the parties appeared on November 14, 1951, at the office of plaintiff's lawyer, where he prepared defendants' promissory note for $8,499, payable to plaintiff, the mortgage on defendants' described real property to secure payment of the note, and an itemized bill of sale to the

machinery and equipment, same being "personal property known as the Bellevue Locker Plant." Such instruments were dated November 14, 1951, at the same time and place. Plaintiff was then paid $1 in cash, and each of said instruments was signed, executed, and delivered by and to the respective parties for the purpose of completing the sale. As in Blum v. Poppenhagen, 142 Neb. 5, 5 N. W. 2d 99, citing Thompson v. Jost, 108 Neb. 778, 189 N. W. 169, such instruments will be considered as one instrument and read and construed together. At the start of the trial herein, it was stipulated that such instruments had been so executed and delivered without prejudice to defendants' plea of failure of consideration and that they were obtained by misrepresentations. In that connection, contrary to plaintiff's contention, "The defense on the ground of fraud may be shown by parol, not to contradict or vary but to destroy the legal and binding effect of a written instrument." Paper v. Galbreth, 121 Neb. 454, 237 N. W. 582.

On November 16, 1951, defendants took possession of the plant and one of plaintiff's sons, who was an experienced operator of such plants and had worked in the plant involved from November 1948 to May 1949, and had inspected it as late as October 1949, showed defendants how to start and shut off the refrigeration and supervised its operation for 3 or 4 days, beginning November 17, 1951. He testified that the plant operated normally and properly while he was there. However, defendant testified that plaintiff's son operated the plant only a short time, and did not run the machinery or equipment long enough to see whether or not it operated to produce the required temperatures for refrigeration. He testified that he learned at once that the plant did not operate automatically but had to be operated manually by pulling a switch off and on again; that he had no customers until about the middle of the next week; that if run continuously, the plant would not

reach a low enough temperature for purposes of refrigeration; and that he had spoilage of meat and other foods for which defendants were liable. Thus, being without funds, defendant got a job outside of the plant, and about Thanksgiving time defendants hired an experienced locker man to manage the plant while defendant's wife and his nephew worked part time in the plant. Also, in December 1951, defendants hired a plant repair company to work on the plant 3 or 4 days and it operated some better for a period of time, but in about a month the motor and compressors burned out and the control piston started to knock, although they ran the plant 4 hours on and 2 hours off around the clock to keep such machinery cool. Defendants elaborated upon the almost continuous spoilage aforesaid, complaints by customers, and the fact that they had the expense of paying customers for such spoilage and for the making of repairs upon the plant. Defendant claimed that he called plaintiff on the telephone several times to tell her about his troubles but she would not answer, and that in January 1952, he wrote plaintiff about his difficulties and she replied that he should see her lawyer. However, plaintiff denied that defendant ever called her or that she refused to talk to him or that such letters were written, which seems to be true because defendants never went to see plaintiff's lawyer and they knew at all times where plaintiff lived but never went there to see her. In that connection, about May or June 1952, plaintiff and defendants met at Packers National Bank by prearrangement. There, an unsuccessful attempt was made by the defendants to sell plaintiff the very property which defendants had mortgaged to her, because they needed funds to operate the plant. However, no complaint was made there by defendants about the condition of the plant; no contention was made there that they had been defrauded; and they never offered to return the property at any time. Also, it will be noted that although plaintiff sent de-

fendants notices when payments on their note and mortgage were due, they never answered such notices or paid any sums whatever thereon. In that connection, "It is not the duty of a creditor to seek out his debtor—it is the duty of the debtor to seek his creditor." Meier v. Geldis, 148 Neb. 234, 26 N. W. 2d 813.

Defendants testified that they tried to obtain customers from a customer card file furnished by plaintiff, as recited in the bill of sale, but that the plant continually failed to operate as it should, and their hired manager left in about 4 months because defendants could not afford to pay him and, as testified by him, he quit because payments on his salary checks were being stopped. In that connection, such manager testified that during that period, defendants had continuous difficulty with refrigeration because they could not keep the temperature down where the plant would refrigerate properly. However, he testified that at first several of his friends followed him to the plant and the first 2 weeks defendants took in about $725, but when he left they had only a few customers. Be that as it may, defendants' landlord testified that he was in the plant regularly to collect the rent from defendants from November 14, 1951, to September 4, 1953, when defendants simply locked the door and abandoned the plant after he had served an eviction notice upon them because they had paid no rent for a year. He also testified that defendants had listed the plant for sale with him as a real estate operator, and that defendants' manager aforesaid had talked with him about buying it. In that connection, such manager admitted in an affidavit given plaintiff's attorney on August 21, 1957, that defendants took in about $714 from sales and locker rentals the first week he was manager; that the business continued to favorably hold its own while he was there; and that during the summer of 1952 he and another named person offered defendants $7,000 for the plant but they would not sell.

In any event, defendants kept right on operating the plant from November 16, 1951, until September 4, 1953. During that period they exchanged part of the equipment purchased from plaintiff for new equipment; kept whatever money they could get from customers; went into debt for plant obligations and paid but little if any thereof; and then listed the plant for sale with realtors. In September 1953, allegedly having only eight or nine customers who could be located, defendants took everything out of their customers' rented lockers; put it in another refrigeration plant; and then, "We just turned the key and walked away." Thereupon, defendants' landlord and other creditors were permitted, without plaintiff's knowledge or consent, to dismantle and take out of the plant and salvage whatever equipment they desired.

With regard to defendants' claim that they had only eight or nine customers whose products were transported to another plant, a copartner thereof produced a list of 42 customers of defendants dated September 4, 1953, when defendants brought the frozen food and products of such customers from their plant. She testified that the foods were in good condition, and that each of such customers had unexpired time coming for locker rentals and defendants agreed to pay for such unexpired time, which came to a total of $254.75 at defendants' rates, no part of which defendants ever paid. The copartner testified that some other customers also came over from defendants' plant and renewed contracts there, and that the products of some others, who had only a short time left on locker rentals, were simply put and kept in a room with only ledger charges made therefor. In the foregoing situation, defendants made no complaint or claim against plaintiff, and took no action seeking redress for alleged damages for fraud until May 16, 1956, after plaintiff had filed this action on March 2, 1956, a period of more than 4 years after knowledge of plaintiff's alleged fraud.

Plaintiff herein pleaded and argued that defendants' defense was barred by the statute of limitations. In that connection, defendants' answers were in effect a defense of recoupment. In Oft v. Dornacker, 131 Neb. 644, 269 N. W. 418, and again in Mettlen v. Sandoz, 131 Neb. 625, 269 N. W. 98, this court concluded that the defense of recoupment or reduction of plaintiff's claim must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations. Therefore, plaintiff's contention with regard to the statute of limitations barring defendants' claim has no merit.

As stated in 77 C. J. S., Sales, § 22, p. 626: "As a general rule there is an entire failure of consideration where the property purchased is entirely worthless * * * there is not a failure of consideration if the property is not entirely worthless, or if it has any substantial value, although less than the consideration paid * * * as where, by reason of some unsoundness or imperfection, it is merely diminished in value, * * *."

In Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612, we held: "Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action." In the light of evidence heretofore summarized, we conclude that defendants' contention that there was an entire failure of consideration because the plant was worthless, is entirely fallacious and has no merit. If the plant ever was worthless, it finally became so because of defendants' own affirmative acts and negligent conduct, for which they were entirely responsible.

In Boettcher v. Goethe, 165 Neb. 363, 85 N. W. 2d 884, we held that: "The asking of a certain price for an item of property is not a representation of its value." In the case at bar, the retired manager of York Corpora-

tion, which installed the plant involved new in 1947, testified that in 4 years it would generally have a 28 to 30 percent depreciation, and that on November 14, 1951, $8,500 would be a fair and reasonable price for the plant.

Also, in Boettcher v. Goethe, *supra,* this court said: "In Cook Livestock Co., Inc. v. Reisig, 161 Neb. 640, 74 N. W. 2d 370, this court referred to the elements of fraud including the one that a representation to be fraudulent must be made either with knowledge of falsity or without such knowledge as a positive statement of known fact and continued: 'In addition to the above, the general rule * * * is that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated on representations or statements which involve mere matters of futurity or things to be done or performed in the future. * * * It is a general rule that fraud must relate to a present or preexisting fact, and cannot be ordinarily predicated on unfulfilled promises or statements as to future events. * * * False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts.'" In that connection, defendants had inspected the entire plant before purchasing it. They said that it looked bad. Nevertheless, we may assume that plaintiff told defendants that the plant would work; that it was in good working condition; and that it contained a "self contained unit arranged for automatic control" as stated in the bill of sale; and that such representations were false in material respects. However, under the circumstances in this case, defendants by their own affirmative acts and conduct have waived fraud as a defense.

In Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330, this court held that: "Where

one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry." See, also, Abels v. Bennett, 158 Neb. 699, 64 N. W. 2d 481, wherein we held that: "A defrauded party must be diligent and prudent in his effort to detect the fraud and means of knowledge thereof are equivalent to knowledge."

In that connection, if there was any fraud, as defendants contend, they became aware of it and had full knowledge thereof at all times from and after the week of November 16, 1951. However, defendants took no steps to return the property or to call plaintiff's attention to the defects thereof, but they affirmatively proceeded to ratify and perform the contract until the plant was dismantled and destroyed by the affirmative acts and conduct of defendants who are responsible therefor, and they are estopped to claim otherwise. See State v. Nielsen, 163 Neb. 372, 79 N. W. 2d 721, wherein we held: "When a person knowing his rights takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right."

Plaintiff has pleaded estoppel and waiver of defendants' alleged fraud, if any. In that connection, as early as Hazen v. Wilhelmie, 68 Neb. 79, 93 N. W. 920, this court held that: "In an action upon a contract for the sale of chattels, evidence by the purchaser that after the delivery of the subject matter he inspected, retained and used it as a whole, shows both an acceptance and a waiver of any objection that the quality was not such as the contract required."

As recently as Dargue v. Chaput, 166 Neb. 69, 88 N. W. 2d 148, citing authorities, we held: "A right of action for fraud may be waived. Thus, while the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the

fraud, he cannot do so where, having full knowledge, he does an act indicating his intention to waive the fraud.

"It is, however, difficult and perhaps hazardous to formulate or to apply general rules as to what will constitute such a waiver, and each case in which the question arises must be considered and disposed of on its own special facts, the underlying question being one of intent.

"Accordingly acts in affirmance of the contract amount to a waiver of the fraud only where they are done with full knowledge of the fraud and of all material facts and with the intention clearly manifested of abiding by the contract and waiving all right to recover for the deception." See, also, 56 Am. Jur., Waiver, § 5, p. 106; Restatement, Contracts, § 484, p. 924. If there ever was a case wherein defendants waived the fraud and were estopped to claim damages by way of recoupment or otherwise, this is one of them.

For reasons heretofore stated, we conclude that the trial court erred in refusing to foreclose plaintiff's mortgage and in cancelling plaintiff's note. Therefore, the judgment of the trial court should be and hereby is reversed and the cause is remanded with directions to render a judgment determining the amount due and unpaid on plaintiff's note and mortgage executed and delivered to plaintiff by defendants on their described real property, and foreclosing said mortgage as a third lien. Also, the judgment shall fix the respective priorities of the liens of other defendants heretofore mentioned, and grant the relief as prayed for by them, in conformity with this opinion. All costs are taxed to defendants McKernan.

REVERSED AND REMANDED WITH DIRECTIONS.

SIMMONS, C. J., not participating.

ROBERT PATRAS, A MINOR, BY LLOYD PATRAS, HIS FATHER AND NEXT FRIEND, APPELLEE, V. MILTON J. WALDBAUM, DOING BUSINESS AS MILTON J. WALDBAUM & CO., ET AL., APPELLANTS, IMPLEADED WITH DOBSON-ROBINSON, INC., APPELLEE.

101 N. W. 2d 465

Filed March 11, 1960. No. 34695.

1. **Trial: Damages.** In an action for damages for loss of future earnings it is the duty of the court to instruct the jury that the amount thereof shall be reduced to present worth or value.
2. ———: ———. In the absence of request the court is not required to instruct as to a basis for determination of present worth or value of future damages.
3. ———: ———. If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous.
4. **Trial: Appeal and Error.** Photographs are admissible in evidence where they may be regarded as instructive upon a question for determination, but if they are not so instructive it is error to admit them.

APPEAL from the district court for Pierce County: LYLE E. JACKSON, JUDGE. *Reversed and remanded.*

Leo A. Capesius and *Joseph H. McGroarty*, for appellants.

Frederick M. Deutsch and *William I. Hagen*, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action for damages by Robert Patras, a minor, by Lloyd Patras, his father and next friend, plaintiff and appellee, against Milton J. Waldbaum, doing business as Milton J. Waldbaum & Co., and Wayne Norman, defendants and appellants, and Dobson-Robinson, Inc., defendant and appellee, growing out of an

accident wherein the plaintiff was injured and damaged, as is admitted to be true, by the negligence of defendant Norman, which negligence was attributable also to the defendant Waldbaum, Norman's employer. Dobson-Robinson, Inc., was made a party defendant because of the fact that the plaintiff was employed by it, the purpose of course being to protect it as employer in the area of workmen's compensation in the event of recovery of damages by plaintiff against the other defendants. No further mention of this defendant will be required herein, therefore when the term defendant or defendants is employed it will refer to Waldbaum and to Norman. The case was tried to a jury and a verdict was returned in favor of the plaintiff for $35,000. Judgment was rendered on the verdict after which a motion for new trial was filed. The motion was overruled. From the judgment and the order overruling the motion for new trial the defendants by appeal seek a reversal of the judgment. After the case came to this court on appeal Lloyd Patras died. On this account Ivadelle Patras was substituted for Lloyd Patras.

Assignments of error urged as grounds for reversal appear in the brief. These, or such of them as require consideration, will be referred to herein following a summary of the pertinent facts.

On August 14, 1957, the plaintiff, then of the age of 18 years, was an employee of Dobson-Robinson, Inc., which company was engaged in highway construction on U. S. Highway No. 20 in the vicinity of Osmond in Pierce County, Nebraska. At a point about 4 miles west of Osmond the highway was closed to traffic by a barricade. At about 6:30 a.m. on that date the plaintiff was engaged in the performance of his duties east of the barricade. At that time defendant Norman was proceeding in an easterly direction on the highway in a truck owned by the defendant Waldbaum. He negligently drove the truck through the barricade into an automobile which was parked just east of the barricade

and caused the automobile to be propelled against the plaintiff, as a result of which the plaintiff received personal injuries and suffered damages. With regard to these facts, as has been indicated, there is no dispute. The only factual dispute on the trial related to the extent of injuries received and the amount of damages sustained.

There is but little dispute as to the findings of injuries at or about the time of the accident or thereafter. The real dispute is as to what the plaintiff's condition was at the time of trial and as to whether his then condition flowed from the accident and injuries or, in whole or in part, from congenital causes, and the amount of future damages to which he was entitled, if any.

As a result of the accident he suffered pain which continued down to the time of the trial; he had a severe laceration of his lip; teeth were broken, one of which was lost; his left thumb was fractured; he had a dislocated hip; and he sustained bruises and lacerations. In addition to all of this he had medical and hospital treatment and the expense thereof, and lost time from work. There is no factual dispute in the evidence as to injuries sustained except as to a condition in the lower back which the plaintiff contends flowed from the accident and which the defendants contend was a congenital condition.

By assignment of error the defendants assert that the verdict is excessive. The effect of another assignment is to say that the excessiveness was brought about because of impropriety of instructions to the jury relating to the amount of damages to be awarded to the plaintiff.

By instruction No. 5 the court instructed the jury that the verdict should be in an amount which would fairly and reasonably compensate the plaintiff for his pecuniary damage or financial loss which would include reasonable value of medical attention and hospital care, value of pain and suffering, inconvenience sustained,

disfigurement, and damage caused by impaired earning capacity. By this instruction the jury was told that the pecuniary damage for pain and suffering was incapable of precise measurement by any certain rule of law, but that from its nature it must depend largely upon the sound judgment and discretion of the jury governed by the circumstances of the case. This instruction and no other informed the jury as to what would or could be the basis for an award for future damages. The instruction concluded as follows: "Any amount you award to the plaintiff for future damages, should be reduced to their present worth or value."

The defendants do not contend that this instruction contains any improper statement of legal principle. They contend substantially that this instruction was and the instructions as a whole were, in the light of the evidence, insufficient to apprise and properly inform the jury of its duty in relation to the fixation of damages, and particularly with reference to future damages.

In all of these respects except one the attack is general and without sufficient particularity to justify extended comment herein. The matter to which particular attention is directed is instruction No. 9 which was given, the express purpose of which was to inform the jury as to its duty in arriving at its verdict as to future damages, if any, which the plaintiff sustained as a result of the accident and his resultant injuries. The instruction, of course, referred to the last sentence of instruction No. 5 which has been quoted herein. Instruction No. 9 is as follows: "By 'present worth or value' of amounts awarded to plaintiff for future damages, if any, is meant such slightly reduced sum, after allowance of the legal rate of interest per annum, for his use and benefit of sums now awarded for future damages, until such time or times as such damages are actually sustained by plaintiff within his expected lifetime."

It is asserted substantially that the instruction is an incorrect statement of the proper method of ascertain-

ing the present worth or value of future damages, and further that the meaning is so obscure that it is not capable of comprehension and application.

It must be said that the instruction does fail to define the proper method of arrival at the present worth or value of future damages. It is contrary to the definitions declared by the decisions of this court.

In Chambers v. Chicago, B. & Q. R. R. Co., 138 Neb. 490, 293 N. W. 338, this court, in a case under the federal employers' liability act, held that the measure of damages for future loss of earnings should be in the amount thereof reduced to present worth and that the jury should be so instructed. It was further held that a more explicit instruction was not required in the absence of request.

This court, in Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643, followed the definitive holding in Chambers v. Chicago, B. & Q. R. R. Co., *supra*. It however departed from the holding that a more explicit instruction in the absence of request was not required, and held that it was the duty of the court to instruct fully on the proper basis for the assessment of damages. In this case it was indicated that a method of arriving at the present worth or value of future damages was required.

In Jacobsen v. Poland, 163 Neb. 590, 80 N. W. 2d 891, the definitive holding of the case of Borcherding v. Eklund, *supra*, was commented on with general approval. However the question of whether or not it is necessary to prescribe or define a method of arriving at present worth or value was not involved. It was pointed out that when the court attempts to prescribe or define a method it must do so within certain limitations or restrictions.

In Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109, this court again approved the definitive holding of Chambers v. Chicago, B. & Q. R. R. Co., *supra*, and returned to the rule that an instruction that the measure of dam-

ages for future loss of earnings should be in the amount thereof reduced to present worth was sufficient in the absence of request for more specific instruction.

In the light of this it is clear that instruction No. 5, in view of the fact that neither party requested more specific instruction, was sufficient on the question of future damages, and except for instruction No. 9, given by the court of its own motion, there could be no valid claim of error because of failure to instruct as to the method for arrival at present worth or value.

Instead of this, however, the trial court gave instruction No. 9 the evident purpose of which was to define the method or a method of ascertaining present value. In this attempt it was its duty to do so correctly and of course comprehensively. In this respect the defendants say that there was failure.

In Hickman-Williams Agency v. Haney, 152 Neb. 219, 40 N. W. 2d 813, it was said: "Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in their consideration of the case, it is good ground for new trial." See, also, City of Crete v. Childs, 11 Neb. 252, 9 N. W. 55.

In Langdon v. Loup River Public Power Dist., 144 Neb. 325, 13 N. W. 2d 168, it was said: "The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired." See, also, Platte Valley Public Power & Irr. Dist. v. Armstrong, 159 Neb. 609, 68 N. W. 2d 200.

Instruction No. 9 fails, in the light of what this court has said with regard to fixation of present worth or value of future damages, to conform with these pronouncements with relation to the true office of instructions to a jury. The court attempted by this instruction

to declare a standard to be followed by the jury in arriving at the present worth or value of plaintiff's future damages.

From an examination of the standard or standards declared by the instruction it appears that it fails to conform to the pronouncements contained in the opinion in Jacobsen v. Poland, *supra*. It is true that in this opinion no fixed and all-inclusive standards appear. It is however clear that what is said there is a negation of what is found in instruction No. 9. From what is said therein directly by this court and what has been quoted therein with approval from the pronouncements of the courts of other jurisdictions it would appear that this court has indicated that when a jury is instructed as to present worth or value of future damages and the trial court goes beyond that declaration and attempts to define the method of arriving at the amount, a fixed formula should not be given which the jury is required to follow. It should receive only an explanatory or illustrative one to aid it in arriving at its verdict.

The giving of tables of expectancy and illustrative tables of the earning value of money is proper as an aid to the jury. These however are to be construed as merely explanatory to the jury and not binding upon it and not impairing its discretion.

Also the fixing of interest rates and returns upon money is not a matter on which instruction should be given. While formulas in this area are proper for submission the jury is not bound thereby in arriving at the present value of future damages. The indicated proper manner of submitting the elements of present worth or value, assuming that such request is made or it is done by the court on its own motion, is to submit the matter on all of the facts and circumstances as disclosed by the evidence together with a formula for guidance but not control of the jury for the fixation of present value of money, which formula shall not exact any particular rate of interest, but shall permit the jury in the light

of its functions and its presumed common knowledge and intelligence to arrive at its own conclusion and decision.

Because of the uncertainty of the meaning of instruction No. 9 it is not clear whether it does or does not run counter to all of the negations which flow directly or by reasonable inference from Jacobsen v. Poland, *supra,* but it is clear that it runs counter to the positive directives of that opinion to which directives reference has been made.

The meaning of the instruction, as indicated, is uncertain. The attempts which have been made to find the meaning have ended in futility. No further attempt will be made herein.

It follows that this instruction to the jury did not conform to proper legal principles and was so worded as necessarily to leave the jury uncertain as to its meaning. Accordingly the giving of the instruction was ground for a new trial.

By the appeal the defendants seek to have the verdict set aside on the ground that it is excessive. In view of the fact that the verdict will be set aside on the ground of error in instructions to the jury it is not deemed proper to consider the matter of the size or amount of the verdict. With the reversal the verdict in all of its aspects becomes nonexistent. The question of the amount of damages should be left to a jury under proper instructions entirely uninfluenced by anything which might be said in this opinion.

On the trial an exhibit consisting of two photographs of the automobile which struck the plaintiff was admitted in evidence over objection of the defendants. It is apparent that the photographs were adduced to show the force and effect of the act which produced plaintiff's injury and damage. The defendants contend that the admission of this exhibit was error. They contend that negligence having been admitted, thus leaving only the question of the character and amount of damage as

the subject of consideration, this exhibit was not admissible for the reason that it had no probative value on the question of damages.

A general rule as to admissibility of photographs is that if they will be practically instructive as evidence they are admissible, but if they are irrelevant and immaterial they should be excluded. See 32 C. J. S., Evidence, § 709, p. 611. The exhibit admitted had no value as instructive evidence and was immaterial in the light of the question for determination, and therefore it was erroneously received in evidence.

For the reasons herein set forth the conclusion is reached that the judgment of the district court should be and it is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

IMOGENE MICHELSON ET AL., APPELLEES, IMPLEADED WITH ORA I. WAGNER, APPELLANT, V. CLARENCE B. WAGNER ET AL., APPELLEES.

101 N. W. 2d 498

Filed March 11, 1960. No. 34718.

1. **Judicial Sales.** A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and may appeal from an order setting the sale aside.
2. **Partition: Judicial Sales.** Every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court.
3. ———: ———. In partition proceedings it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the same.
4. **Judicial Sales.** It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in

view of all the circumstances. The court must act in the interest of fairness and prudence, and with a just regard to the rights of all concerned and the stability of judicial sales.

5. **Partition: Judicial Sales.** Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered.

6. **Judicial Sales.** An upset bid, made after the judicial sale has been held and prior to its confirmation by the court, is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the highest bid at the advertised judicial sale.

APPEAL from the district court for York County: JOHN D. ZEILINGER, JUDGE. *Reversed and remanded with directions.*

John E. Dougherty, for appellant.

R. E. Lunner and *Gerald F. Beaver*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for York County. It involves a partition action. The question raised by the appeal is whether or not the trial court abused its discretion by ordering the referee appointed therein to make a public resale of the land being partitioned.

On May 19, 1959, the trial court rendered a decree in this action finding and confirming the interests of the several parties thereto in and to 360 acres of land located in York County, which is fully described therein; ordered partition to be made thereof accordingly; and appointed a referee for that purpose. The trial court's decree established the ownership of the land to be in 11 people, 9 of whom each owned a 1/10th interest while the other 2 owned a 1/20th interest. The referee reported that the real estate could not be advantageously divided into the requisite number of parcels with-

out great prejudice to the several owners thereof and recommended that it be sold. This report the trial court approved, ordering the real estate to be sold at public sale at the place therein specified, same to be for cash with a deposit of 15 percent of the bid to be made with the referee at time of the sale.

On June 22, 1959, the referee filed his report, saying that on June 19, 1959, he had sold the lands to Ora I. Wagner and Myrtle Wagner, husband and wife, for $48,000, and that the amount bid was the "highest bid obtainable." We shall hereinafter refer to Ora I. and Myrtle Wagner as the Wagners. Thereafter, on July 3, 1959, Cecil W. Wagner, an owner of a 1/10th interest in the land being partitioned, filed objections to the sale made by the referee being confirmed and requested a resale thereof on the ground "that the highest bid is unreasonable and insufficient; that a considerably higher bid has been submitted for said real estate." We shall hereinafter refer to Cecil W. Wagner as the objector. On the same day Henry C. Bjerrum filed an "Offer" with the clerk of the court of $49,000 for the 360 acres to which he attached his certified check in the sum of $5,145. The Wagners filed an answer to the objections. A hearing was had thereon and on July 15, 1959, the trial court found "that said offer of Henry C. Bjerrum is a substantial increase over the high bid at the sale; that a resale of said property will produce substantially more money for the owners of the property than the sale reported by the referee; that it is to the best interest of the owners of the property that the sale conducted by the referee be denied confirmation and that the property be resold at public auction with the $49,000.00 offer of Henry C. Bjerrum as the opening bid on the resale; * * * and that the Clerk of the Court should retain the certified check of Henry C. Bjerrum for $5,145.00 until further order of the court." Based on such findings the court, after sustaining the objections filed and refusing confirmation of the sale had, ordered the referee

to proceed to resell the real estate at public sale at the same place as before and upon the same terms, stating: "* * * with the opening bid to be the $49,000.00 offer of Henry C. Bjerrum." The Wagners filed a motion for new trial and have perfected this appeal from the overruling thereof.

"A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and appeal from an order setting the sale aside." Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527. See, also, Knouse v. Knouse, 157 Neb. 748, 61 N. W. 2d 388; County of Lancaster v. Schwarz, 152 Neb. 15, 39 N. W. 2d 921.

"* * * every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court." Siekert v. Soester, *supra*. See, also, Knouse v. Knouse, *supra;* County of Lancaster v. Schwarz, *supra*.

"In partition proceedings, it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale." Knouse v. Knouse, *supra*. See, also, Siekert v. Soester, *supra*.

"It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a regard to the rights of all concerned, and the stability of judicial sales." 30A Am. Jur., Judicial Sales, § 122, p. 971. See, also, 50 C. J. S., Judicial Sales, § 52 c, p. 671, § 28 d (4), p. 617; 68 C. J. S., Partition, § 193 b, p. 318. As stated in County of Lancaster v. Schwarz, *supra*: "If the sale was fairly con-

ducted and the property sold for a reasonable and fair value under the circumstances, the court is ordinarily required in the exercise of its judicial discretion to confirm the sale. Inadequacy of price is not of itself sufficient to warrant a resale unless it appears that such resale would probably produce a higher price. Due regard must be given to the rights of the successful bidder and the stability of judicial sales generally." See, also, 30A Am. Jur., Judicial Sales, § 122, p. 971.

Apparently there were two contentions made by the objector in the district court as to why the sale made by the referee should not be confirmed and a resale ordered, although the first of these is not too well pleaded. The first is that, considering the bid received by the referee, the land did not sell for a sufficient amount in view of its fair and reasonable value. That such is a proper basis upon which a resale may be ordered is evidenced by our opinion in Knouse v. Knouse, *supra*. The only witness who attempted to testify for the objector as to the value of the land was the objector himself. He has lived on this land, and farmed it, since 1919 with the exception of about 10 months when he was in the armed forces of his country. He described the land, about 80 acres of which were pump irrigated, the crops growing thereon, the yield thereof, and the improvements. That he was qualified to testify as to the fair and reasonable value thereof is evidenced by our holdings in Borden v. General Insurance Co., 157 Neb. 98, 59 N. W. 2d 141, and Knouse v. Knouse, *supra*. But no attempt was made to establish the fair and reasonable market value of the land at the time of sale by this witness. All he testified to in that regard is that "it should bring better than $50,000." We do not think this is evidence upon which to base any finding as to the fair and reasonable market value of the land, but assuming that it is we do not think it is sufficient to establish that the land did not bring its fair and reasonable market value, especially when we consider

the fact that the referee, who was appointed by the court and who was familiar with the land, testified that he thought it had brought its fair and reasonable value.

The objector also set out that a considerably higher bid had been submitted for the real estate; that being the offer of Henry C. Bjerrum in the amount of $49,000. That a substantially increased offer can be the basis for a trial court ordering a resale is evidenced by our holdings in Siekert v. Soester, *supra;* First Nat. Bank v. First Trust Co., 145 Neb. 147, 15 N. W. 2d 386; and Knouse v. Knouse, *supra.* As stated in Siekert v. Soester, *supra*: "Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered." In Siekert v. Soester, *supra,* the upset bid was an increase of 7.8 percent; in First Nat. Bank v. First Trust Co., *supra,* 8 percent; and in Knouse v. Knouse, *supra,* 5.4 percent.

However, as we said in County of Lancaster v. Schwarz, *supra*: "An upset bid, made after the judicial sale has been held and prior to its confirmation by the court, is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the highest bid at the advertised judicial sale. * * * The upset bid to be effective must be substantial and material, and not merely nominal; otherwise it would not tend to establish fraud or unfairness at the judicial sale or the inadequacy of the highest bid procured at such sale. Whether such a bid is sufficient to warrant a resale or a reopening of the bidding is largely a discretionary matter with the trial court. It follows that the discretion of the court to reject the high bid at the judicial sale gains latitude as the upset bids become larger. * * * The mere fact that a higher upset bid has been received is not a sufficient reason of itself to refuse to confirm a judicial sale. The court will not

ordinarily refuse to confirm a sale which has been regularly held and fairly conducted. An upset bid should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permit its acceptance. * * * In determining whether an upset bid is sufficient to sustain a finding that the price obtained at judicial sale was inadequate, the court must exercise the discretion vested in it in accordance with established legal principles." The court therein goes on to say: "If upset bids were permitted and accepted under any and all circumstances, the holding of judicial sales would become only a means of bidding on the property instead of an opportunity to purchase it. Bidders would naturally pass up the judicial sale and place their bids with the court immediately prior to the hearing on confirmation and thereby eliminate the risk of loss by depreciation in the value of the property pending confirmation. Such procedure seeks to deprive a purchaser at judicial sale of the property if the bidder making the upset bid thinks the purchase an advantageous one and leaves it to the buyer if he thinks the purchase unwise. The effect of such a procedure would be to chill the bidding at judicial sales and would largely eliminate the purpose for which they are held."

The sale was widely advertised by the referee, not only by the required legal notice but by display advertising in newspapers having local circulation as well as in those having state-wide circulation and by distribution of handbills in the neighboring towns. In the neighborhood of $150 was expended by the referee for that purpose. Some 24 or 25 people attended the sale, including both the objector and Bjerrum. There appears to have been spirited bidding by those present as evidenced by the number of bids received by the referee. The 360 acres were offered for sale by the referee as a unit and in two tracts, one of 120 acres and the other

of 240 acres. The objector bid as high as $37,000 on the 240-acre tract, which was apparently the improved home place, while Bjerrum testified he bid as high as $46,600 on the entire tract. The sale was opened at 2 p.m., and was held open for about 2½ hours. The referee sold the land as a unit to the Wagners. Both the objector and Bjerrum were present when the sale was closed and the objector, when asked by the referee if he should close the sale on the $48,000 bid of the Wagners, told him to "Sell it." The referee, who testified he thought the land sold for its fair and reasonable value, then closed the sale, having accepted the $48,000 bid of the Wagners. The Wagners thereupon paid the sum of $7,200 to the referee, that being 15 percent of their accepted bid.

There is no question but what the sale was well advertised, well attended, and fairly conducted, and resulted in spirited bidding. The increased offer of Bjerrum is only a 2.1 percent increase over the final bid received and accepted by the referee and if we consider the $150 expended by the referee for advertising, without considering any increase in expense because of additional fees that may be allowed because of a resale, the increase is only about 1.8 percent. Such increase is not substantial and, as suggested in County of Lancaster v. Schwarz, *supra,* to permit such a small increase to upset a judicial sale fairly had and at which everyone present was given ample opportunity to bid would be to chill the bidding at judicial sales and largely eliminate the purpose for which such sales are held.

We have come to the conclusion that the trial court abused its discretion in refusing confirmation, sustaining the objections filed, and ordering a resale. We therefore reverse its order doing so and remand the cause to the district court with directions to overrule the objections filed to the referee's sale; to reject the offer of Henry C. Bjerrum to increase the bid to $49,000; to approve the referee's report; to confirm the sale made

by him to the Wagners as shown by his report filed on June 22, 1959; and for such other and further orders as may become necessary to fully complete the referee's sale and the distribution of the proceeds resulting therefrom. All costs of this appeal are taxed to the objector.

REVERSED AND REMANDED WITH DIRECTIONS.

CARTER, J., dissenting.

The cases cited in the majority opinion correctly state the law on the issues raised in them. My dissent is directed to the fact that they have no application to the present case.

In the instant case the judicial sale produced a bid of $48,000. After the sale and before the hearing on confirmation an additional bid of $1,000, which I shall hereafter refer to as a jump bid, was guaranteed if a resale of the property was permitted. The trial court refused to confirm the sale and ordered a new sale. It is my contention that the granting of a resale under these circumstances is wholly within the discretion of the trial court and not subject to review.

This court has uniformly held that, where a jump bid has been made, a resale is within the discretion of the trial court. The rules announced in the majority opinion have been applied only where the trial court confirmed the sale and an appeal was taken therefrom. We stated the rule in Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527, as follows: "According to the third doctrine (See 11 A. L. R. note, pp. 417 to 419, inclusive), where there has been an advanced bid before confirmation, the entire matter of confirmation of judicial sales is left with the trial court, to be confirmed or not according to its judicial discretion. This doctrine is the one heretofore approved and adopted by this court. True, in several cases it has been held by this court that a judicial sale will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake, or to shock the conscience of the

court. But in these cases there was no evidence that others were willing to pay more." Other cases to this effect are: State Bank v. Green, 11 Neb. 303, 9 N. W. 36; Prudential Real Estate Co. v. Hall, 79 Neb. 805, 113 N. W. 243; Crews v. Alberts, 124 Neb. 671, 247 N. W. 602; State ex rel. Sorenson v. Denton State Bank, 126 Neb. 486, 253 N. W. 670; First Nat. Bank v. First Trust Co., 145 Neb. 147, 15 N. W. 2d 386; County of Nance v. Thomas, 146 Neb. 640, 20 N. W. 2d 925; County of Gage v. Beatrice Nebraska Water Co., 147 Neb. 236, 22 N. W. 2d 696; Ehlers v. Campbell, 147 Neb. 572, 23 N. W. 2d 727; Knouse v. Knouse, 157 Neb. 748, 61 N. W. 2d 388. The opinion of the majority overrules the holdings of the foregoing cases without doing so in terms. I have not found a single case in this state which reverses an order of the trial court in refusing to confirm a sale and ordering a new sale where a jump bid assures a higher bid on the resale. In Siekert v. Soester, *supra*, the highest bid was $3,525 and the jump bid $3,800, an increase of $275. This court refused, under the foregoing rule, to interfere with the discretion of the trial court in denying confirmation and granting a resale. In First Nat. Bank v. First Trust Co., *supra*, this court sustained the action of the trial court in setting aside a confirmation already entered and ordering a new sale on an assured jump bid of $1,000. I submit that the order of the trial court directing a new sale in the present case should be affirmed under the foregoing authorities.

It is the duty of the trial court to secure the highest possible price for property sold at judicial sale. In accomplishing this result the trial court has a broad discretion in determining whether or not a sale should be confirmed. If the trial court confirms the sale, the rules cited by the majority will be applied on appeal. If a resale is granted after a larger bid is assured on resale, the discretion of the trial court has not, previous to this case, been subject to review. I submit that the

rule heretofore existing is the proper one if trial courts are to follow the injunction imposed on them to obtain the highest price possible for property sold at judicial sale. In many instances, particularly in times of economic stress, judicial sales do not produce adequate bids, or any bids at all. To take from trial courts the discretion to refuse confirmation and grant a resale where an increased bid has been assured does not appear to be in the public interest.

The duty of an appellate court to protect its own jurisdiction and powers is no greater than its duty to protect the jurisdiction and powers of the courts inferior to it. I disagree with the action of this court in arrogating to itself the right to review the action of the district court in a matter that has been traditionally the exclusive prerogative of the district courts.

CHAPPELL, J., dissents separately.

FAE E. ADOLF, APPELLANT, V. UNION NATIONAL LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.
101 N. W. 2d 504

Filed March 11, 1960. No. 34720.

1. **Insurance.** Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency.
2. ———. A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract.
3. ———. When an application or conditional receipt provides that insurance shall be effective as of the date of the application or conditional receipt, subject to the approval of the application or its acceptance by the insurer, no protection is afforded the applicant until the application is approved or accepted.
4. ———. While an applicant is entitled to have indefinite and ambiguous provisions of an insurance contract construed in his favor, nevertheless, plain and unambiguous provisions cannot be disregarded because they were not read or understood by the applicant.

5. **Contracts: Evidence.** Parol evidence is not admissible to vary the terms of a written contract of insurance.
6. **Insurance.** A provision in a contract of insurance that the insurer will not be bound by statements or promises made by an agent unless the same are reduced to writing, submitted to the company at its home office, and made a part of the contract, is a limitation upon the authority of the agent, and agreements made by the agent not in compliance therewith have no binding effect on the insurer.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Wellensiek & Weaver, Healey, Wilson & Barlow, and *Patrick W. Healey,* for appellant.

Perry, Perry & Nuernberger and *Edwin C. Perry,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action on an alleged contract of insurance to recover the sum of $20,000. At the close of all the evidence the trial court directed a verdict for the defendant, and the plaintiff has appealed.

The plaintiff testifies that on March 27, 1952, the insurance company entered into a contract of insurance with Calvin G. Boyd by which the life of Boyd was insured for $20,000. Plaintiff at that time was the wife of Boyd and the named beneficiary in the alleged contract of insurance. A formal policy of life insurance was never issued by the insurance company. The applicant, Calvin G. Boyd, died in an automobile accident on June 9, 1952. The plaintiff as beneficiary brings the action to recover $20,000 under the terms of the alleged insurance contract.

The evidence shows that E. A. Sommerville was a soliciting agent for the insurance company. Some time prior to March 27, 1952, the agent solicited Boyd to purchase a policy of life insurance. On March 27, 1952,

his solicitation culminated in an application for life insurance in the amount of $20,000. A written application was completed and signed by Boyd. On the oral representation of the agent that the insurance would be immediately in force if he paid the first annual premium in cash, Boyd gave the agent his check for $128, which was admittedly the full amount of the first annual premium. The agent thereupon issued a receipt to Boyd, which together with the application is alleged to constitute a contract with the insurance company for temporary insurance.

The evidence shows that the agent arranged for Boyd to have a medical examination by Dr. Donal H. Morgan at McCook on April 1, April 14, May 7, and May 19, all in 1952. An appointment was also made with Dr. Robert T. Jones for a Sunday in May subsequent to May 19 and prior to Boyd's death. Boyd failed to keep any of these appointments and at no time submitted to a medical examination. The evidence shows that the insurance company advised the agent on several occasions that the report of the medical examination was required before the company could act on the application. The agent testifies that he repeatedly talked with Boyd about the necessity of his submitting to a medical examination. On May 12, 1952, the company wrote Boyd direct in which it said: "We are writing to you about completing your medical examination so that we may take action upon your application for insurance in our company." An acceptance of the application was never indicated, and a formal policy was never issued by the company. The company retained the premium, however, and tendered it back after the death of Boyd.

The plaintiff testifies that she heard the agent tell the applicant that the insurance would be immediately effective if the first annual premium was paid. The agent denies that he made this statement, but we shall consider the case as if the statement was made. We

think this evidence on the part of the plaintiff should have been excluded for two reasons. First, it was an attempt to vary the terms of the written contract. Second, it was outside the scope of the authority of the soliciting agent to thus bind the company under the very terms of the application which provided: "This application * * * and any policy or policies issued in consequence thereof shall constitute the entire contract of insurance and the Company shall not be bound by any statements, promises or information made or given by or to any agent or other person unless the same be reduced to writing, submitted to the Company at its Home Office, and made a part of such contract."

The plaintiff relies upon Whitehall v. Commonwealth Casualty Co., 125 Neb. 16, 248 N. W. 692, and Echols v. Mutual Life Ins. Co., 106 Neb. 409, 184 N. W. 58. The Whitehall case involved a policy of accident insurance. The application was signed, the premium paid, and the policy issued, although there was a question as to whether or not it had been actually delivered to the applicant before the accident occurred for which suit was brought. It was held that the soliciting agent and a general agent of the company, who was present when the application was taken, had authority to make an oral contract of insurance. There is no evidence in the instant case that the soliciting agent had any authority to vary the terms of the application and conditional receipt contrary to the quoted provision of the application. In the Echols case a waiver of the time of payment of the first premium was shown which was expressly concurred in by the general agent of the company. The policy was issued and not delivered promptly by the soliciting agent through no fault of the applicant. We fail to see how these cases are pertinent to the situation in the case at bar. The plaintiff is clearly bound by the provisions of the application signed by the applicant. It is a part of the contract, if it can be said that a contract of insurance was actually made. Muhlbach v.

Omaha Life Ins. Co., 107 Neb. 206, 185 N. W. 447. There is no indication of a waiver by the company of any of the provisions of the application or the conditional receipt. In the absence of a proper waiver, such provisions are an effective part of the proposed insurance contract.

The controlling question is whether or not there was a contract of insurance in existence between the defendant and the applicant at the time of the latter's death. The only competent evidence of a contract of insurance is the application signed by the applicant, a receipt signed by the soliciting agent on a form provided by the company, and the payment of the first annual premium. The retention of the first annual premium by the defendant does not prejudice the rights of the insurance company when it is retained under a provision of the receipt, as here, that if no insurance is issued the premium will be returned upon demand and the surrender of the receipt. Muhlbach v. Omaha Life Ins. Co., *supra*.

It is the contention of plaintiff that the acceptance of the premium, and the issuance of the receipt containing the provisions that it did, created a valid and existing contract of temporary insurance which was in full force until a formal policy was issued or until the application was rejected and the return of the premium tendered during the lifetime of the applicant. The provisions of the receipt therefore become a controlling consideration in the case.

The application appears on a regular form furnished by the insurance company. A blank form of receipt was attached to the application blank which was detachable by means of a perforated line. The soliciting agent filled in the blanks in the receipt, detached it from the application, and gave it to the applicant when the first annual premium was paid. Across the top of the receipt is the following: "Receipt To Be Given Applicant When Settlement Toward First Premium Is Made

At Time of Application." Across the end of the receipt in heavy type are the words: "CONDITIONAL RECEIPT." The pertinent part of the body of the receipt provides: "If the entire first premium called for in the proposed policy has been paid at the time of making such application, the insurance applied for shall take effect on the date of this receipt provided the application be completed as agreed therein and unconditionally accepted by the Company at its Home Office and provided also the applicant is on this date a risk acceptable to the Company under its rules, limits and standards on the plan and for the amount applied for and at the standard rate of premium in accordance with the published rates of the Company; otherwise the payment evidenced hereby will be returned upon demand and surrender of this receipt."

The heading on the receipt does not indicate a provision for temporary insurance, and the words in heavy type across the end clearly indicate that the receipt was conditional. The quoted portion of the receipt is clear and explicit, and cannot be said to be ambiguous. It provides that liability exists if certain conditions are fulfilled before a formal policy is issued. These conditions were not fulfilled. The plaintiff does not contend otherwise.

It is the contention of plaintiff that the quoted portion of the receipt would indicate to an unsuspecting and untutored applicant that he had temporary insurance while the insurance company was considering his application; that, while the real nature of the receipt might well be understood by underwriters, it should be read in the light of the fact that it was to be submitted to persons unacquainted with the niceties of life insurance; and while a person must read what he signs and is chargeable if he does not, yet where insurers seek to impose upon words of common speech an esoteric significance intelligible only to their craft, they must bear the burden of any resulting confusion. The following

cases, among others, are cited in support of this contention: Liberty Nat. Life Ins. Co. v. Hamilton, 237 F. 2d 235; Metropolitan Life Ins. Co. v. Grant, 268 F. 2d 307; Hart v. Travelers Ins. Co., 236 App. Div. 309, 258 N. Y. S. 711; Gaunt v. John Hancock Mut. Life Ins. Co., 160 F. 2d 599.

Under the law of this state the acquiring of insurance has always been a matter of contract. Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency. It is true, however, that an insurance contract will be construed against the insurance company when the contract or policy is indefinite or ambiguous because it drafted the contract or policy and is responsible for any indefiniteness or ambiguity therein. But where the contract is plain and unambiguous in its meaning the contract will be enforced according to its terms. Unless this be the law, the attaching of liability on an insurance company, contrary to the plain meaning of the contract, would be nothing less than a rewriting of the liability provisions of the contract. It appears to us that it would be a dangerous innovation of contract law to hold that one is not bound by what he signs, and that that which he fails to read or understand should be read out of the contract. We dealt with this subject in Reid v. Bankers Life Co., 148 Neb. 604, 28 N. W. 2d 542, wherein we said: "It seems to me that some courts, of the very highest respectability and learning, have taken judicial notice of matters which they were not by law authorized to judicially know, and have gone so far in holding insurance companies liable as to result in the application of different rules of contract law to them than would have been applied to individuals under the same circumstances. I cannot agree that this may rightfully be done."

In the last case cited we quoted the following with

approval from Lumber Underwriters v. Rife, 237 U. S. 605, 35 S. Ct. 717, 59 L. Ed. 1140: "Of course if the insured can prove that he made a different contract from that expressed in the writing he may have it reformed in equity. What he cannot do is to take a policy without reading it and then when he comes to sue at law upon the instrument ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause."

The applicant in the instant case agreed to submit to a physical examination if the company did not consider his statements in the application sufficient. The evidence shows that a medical examination was required, not only by the evidence of the soliciting agent, but by a letter from the home office to the applicant under date of May 12, 1952. The applicant failed to comply with this part of his agreement. The record shows that the applicant was 27 years of age, 6 feet 3 inches in height, and weighed 270 pounds. It is not disputed that the applicant was overweight and not entitled to insurance at standard rates under the Build Chart used by the defendant and commonly used by underwriters. He was not within the conditions set forth in the conditional receipt on this point. It is clear that the application was never approved nor accepted by the insurance company as required by the terms of the conditional receipt. He was not a risk acceptable to the company under its rules, limits, and standards existing at the time as established by the evidence, and this constitutes a noncompliance with a condition contained in the conditional receipt. The application provided that the company should have 60 days to consider the application, and if a policy was not delivered within 60 days the application was to be considered as declined by the company. While this provision appears to have been waived, the fact remains that the applicant, by his failure to submit to a medical examination,

delayed the consideration beyond the specified 60 days. On June 9, 1952, the date of the death of the applicant, the company rejected the application.

Under this state of the record the applicant had no contract for temporary insurance because the conditions precedent necessary to the attaching of liability, as set forth in the conditional receipt, were never met. Since no liability for temporary insurance ever attached, and a formal insurance policy was never issued, the insurance company assumed no liability and it could properly reject the application as it did.

The trial court concluded that no contract for temporary insurance was entered into as a matter of law and directed a verdict against the plaintiff. We think the trial court was correct in so doing, and the judgment is affirmed.

AFFIRMED.

LORIN R. SUMMERVILLE, APPELLEE, V. NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, ET AL., APPELLANTS.

LORIN R. SUMMERVILLE, APPELLEE, V. P. COOPER ELLIS, COUNTY TREASURER OF SCOTTS BLUFF COUNTY, APPELLEE, NORTH PLATTE VALLEY WEATHER CONTROL DISTRICT, A CORPORATION, INTERVENER-APPELLANT.

101 N. W. 2d 748

Filed March 11, 1960. No. 34721.

1. **Statutes.** In determining whether any legislation is valid, it is proper to examine and ascertain what may be done or accomplished pursuant to said legislation.
2. **Constitutional Law: Statutes.** If the statutes, when fairly construed, authorize and sanction the taking of private property without just compensation, or deprive persons of their property without due process of law, then such legislation is invalid.
3. **Municipal Corporations: Statutes.** It is a rule of general recognition that the formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries are legislative functions.

4. **Constitutional Law: Statutes.** The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals.
5. ———: ———. Where it is authorized to be initiated by private individuals, there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined.
6. ———: ———. The Legislature may not delegate legislative functions to private persons.
7. ———: ———. Article III, section 27, of the Constitution of Nebraska, provides in part that no act shall take effect until 3 calendar months after the adjournment of the session at which it was passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall by a vote of two-thirds of all members otherwise direct.
8. **Judgments.** A case must be determined on the law as it stands when judgment is rendered therein.

APPEAL from the district court for Scotts Bluff County: RICHARD VAN STEENBERG, JUDGE. *Affirmed.*

Marvin L. Holscher and *Jack E. Lyman,* for appellants.

Atkins & Ferguson, Clark G. Nichols, W. H. Kirwin, and *Straight Townsend,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

The plaintiff, Lorin R. Summerville, filed a petition in the district court for Scotts Bluff County against the North Platte Valley Weather Control District, a corporation, hereinafter referred to as the district, Dave Dillman, George Sato, Harry Webber, Evert Thomas, Henry Sands, Benjamin F. Roberts, Jr., Frank E. Berquist, Jerry Hays, C. C. Hendrickson, and P. Cooper Ellis, defendants, praying for judgment determining and declaring L. B. 539 enacted into law by the Sixty-eighth Session of the Nebraska Legislature in 1957, now sections 2-2410 to 2-2427, R. S. Supp., 1957, to be unconsti-

tutional, and restraining P. Cooper Ellis, county treasurer of Scotts Bluff County, from levying, assessing, collecting, or attempting to collect taxes under authority of such law. Defendant P. Cooper Ellis demurred to the petition because of a misjoinder of several causes of action and a defect of parties defendant. By order of the court the action was dismissed as to defendant P. Cooper Ellis, county treasurer, by reason of a misjoinder of the parties defendant.

Thereafter plaintiff filed an amended petition against all defendants except P. Cooper Ellis, county treasurer of Scotts Bluff County, praying for judgment determining and declaring that L. B. 539 enacted into law by the Sixty-eighth Session of the Nebraska Legislature in 1957, now sections 2-2410 to 2-2427, R. S. Supp., 1957, to be unconstitutional, and restraining said defendants and each of them from collecting any funds paid to the county treasurer of Scotts Bluff County; from disbursing said funds or obligating them in any way; from creating any debts or obligations chargeable to said district which could result in any levy on property for payment thereof; and from entering into any contract or contracts for the expenditure of any funds raised by the 1-mill levy either in the hands of the defendants, or any of them, or in the hands of the county treasurer of Scotts Bluff County.

On the same day the plaintiff filed a petition in the same court against P. Cooper Ellis, county treasurer of Scotts Bluff County, defendant, to enjoin the defendant from disbursing to said district, any of its officers, or any person any of the funds paid into his office by reason of the 1-mill levy, from collecting from the property of the plaintiff and those similarly situated any of the unpaid tax created by the 1-mill levy which had not been paid to him, and to declare the act as above described to be unconstitutional.

The North Platte Valley Weather Control District filed a petition in intervention in the latter case by leave

of court, praying that plaintiff's petition be dismissed.

By stipulation of the parties and order of the court, the two above-mentioned cases were consolidated for the purpose of trial and all purposes thereafter.

The trial court rendered judgment granting the injunctions prayed for by the plaintiff against the defendants. The court also made a finding that sections 2-2410 to 2-2427, R. S. Supp., 1957, known as the Weather Control Act of Nebraska, were unconstitutional and void for the reason, among others, that the act provided for an unwarranted and unlawful delegation of legislative authority to private individuals.

In the case brought by the plaintiff against P. Cooper Ellis, defendant, the court's decree was substantially the same as in the case against the other defendants, except that the defendant district's petition in intervention therein was dismissed, the defendant P. Cooper Ellis, county treasurer, was enjoined from disbursing to the district any of the funds collected for said district, and the court retained jurisdiction of the cause for the purpose of determining distribution of any funds collected and in the hands of P. Cooper Ellis, county treasurer of Scotts Bluff County, or any such funds received by him in the future.

The district, as intervener, filed a motion for new trial which was overruled.

The district and other defendants, except P. Cooper Ellis, county treasurer of Scotts Bluff County, filed a motion for new trial which was overruled.

The district and all defendants named by the plaintiff except P. Cooper Ellis, county treasurer of Scotts Bluff County, perfected appeal to this court.

The plaintiff in his amended petition, insofar as necessary to consider here, alleged the formation of the district under the provisions of the Weather Control Act of Nebraska, sections 2-2410 to 2-2427, R. S. Supp., 1957; that the act attempted to deprive persons of their property without due process of law, attempted to take

property without just compensation, and attempted to delegate to private persons legislative functions; that the act failed to establish any tribunal or court for the determination of the legality of the tax or the inclusion or exclusion of the property subject to taxation; and that the tax levied by the district was for an illegal and unauthorized purpose. Plaintiff prayed for judgment declaring the act unconstitutional and void, and for injunctive relief as previously mentioned.

The plaintiff's petition in the case wherein P. Cooper Ellis, county treasurer of Scotts Bluff County, was made the defendant was substantially the same as in the case of the other defendants, and the prayer was for injunctive relief as heretofore mentioned.

The answer of P. Cooper Ellis to the plaintiff's petition set forth his duties as county treasurer relating to taxes collected from the taxpayers of Scotts Bluff County in the district, and prayed that the plaintiff's petition be denied.

The answer of the district and the other defendants contained a general denial of the allegations of the plaintiff's amended petition; alleged that the district was created in accordance with the act; set forth the business of the district after its inception; and alleged that the district as created was a valid district and a subsisting public corporation of the state authorized and empowered to conduct and transact business as provided for in the act.

The defendant district's petition in intervention alleged substantially the same facts as set forth in the answer of the defendants.

The plaintiff's answer to the petition of intervention of the district was a general denial.

The plaintiff's reply to the defendants' answer to his amended petition was a general denial of the allegations contained therein not admitted.

The defendants' assignments of error deemed necessary to a determination of this appeal are as follows:

(1) The trial court erred in declaring the Weather Control Act of Nebraska, sections 2-2410 to 2-2427, R. S. Supp., 1957, unconstitutional; and (2) the trial court erred in failing to find that section 23, L. B. 633, Sixty-ninth Session of the Nebraska Legislature, legalized and validated all proceedings taken and acts done in the organization and creation of the district.

The facts were stipulated by the parties and show that the district was formed in compliance with the provisions of L. B. 539, enacted by the Sixty-eighth Session of the Legislature of Nebraska, which act, hereinafter called the act, now appears as sections 2-2410 to 2-2427, R. S. Supp., 1957. At all times mentioned Dave Dillman, George Sato, Harry Webber, Evert Thomas, Henry Sands, Benjamin F. Roberts, Jr., Frank E. Berquist, and C. C. Hendrickson were the board of directors of the district. The defendant Jerry Hays submitted his resignation on August 11, 1958, as one of the directors of the district. His resignation was accepted by the board of directors of the district on August 12, 1958, and the vacancy created by said resignation was not filled. Defendant P. Cooper Ellis was at all times involved in this action the duly elected, qualified, and acting county treasurer of Scotts Bluff County. The petition for organization of the district was filed with the Secretary of State of Nebraska on April 4, 1958. On April 8, 1958, the Secretary of State found that the petition contained the required number of signatures and met the requirements of the act, and ordered that the question of the organization of the district be submitted to a vote on May 13, 1958, of the electors living within the proposed district. A copy of the order was delivered to the county clerks of Scotts Bluff, Morrill, Sioux, and Banner Counties. Pursuant to the order of the Secretary of State, notices of the special election and ballots were duly published as provided by law. On May 26, 1958, the Secretary of State, after tabulation of the ballots cast in such election, found the total

voting for organization of the proposed district exceeded 55 percent of those voting in such election, and since in excess of 55 percent of those voting in such election voted in favor of the organization of the proposed district, he determined that the said district was fully organized pursuant to the laws of the State of Nebraska. On June 30, 1958, bonds in the penal sum of $5,000 were filed with and approved by the Secretary of State for each of the defendant directors. On July 1, 1958, an organizational meeting was held by the directors and a president, vice president, secretary, and treasurer were elected. The district certified a 1-mill levy to the county clerks of Scotts Bluff, Morrill, Sioux, and Banner Counties on July 1, 1958. Prior to such certification the board of directors adopted a budget in the amount of $55,000 for a hail suppression program to be conducted during the summer of 1959, and $5,000 for expenses incident to carrying on the project as provided for by the act. Since July 1, 1958, by and through its board of directors, the district had conducted and was conducting business as authorized by the act by expending funds of the district, and had entered into contracts with the Colorado State University at Fort Collins, Colorado, to conduct research on hail suppression, and with Weather Engineers, Inc., of Loomis, California, whereby said engineers agreed to conduct for the district a hail suppression program in such district for the period from May 10, 1959, to and including September 30, 1959.

We deem it unnecessary to set out other facts as contained in the record.

Section 2-2427, R. S. Supp., 1957, provides that the act may be cited as the Weather Control Act of Nebraska. We hereafter use the term "act."

We set forth only the sections of the statute relating to the act which are necessary in determining this appeal.

Section 2-2411, R. S. Supp., 1957, provides: "Proceedings for the establishment of a weather control dis-

trict may be initiated only by the filing of a petition with the Secretary of State. The petition shall be signed by not less than fifteen resident owners of land in each of a majority of the precincts lying wholly or partly within the proposed district."

Section 2-2412, R. S. Supp., 1957, provides in part: "(1) The petition, referred to in section 2-2411, shall set forth: (a) The proposed name of the district; (b) a description of the territory to be included in the district, together with the proposed boundaries of such district and the divisions thereof for the purpose of election of directors, and a map showing such boundaries; (c) the number and terms of directors that the district shall have if formed, together with the name, address, term of office, and division to be represented of each of the proposed directors, who shall serve until their successors are elected and qualified, designating their terms so that not more than one-third shall terminate every two years; (d) where the offices of such proposed district are to be maintained; and (e) a prayer that the organization of the district be submitted to a vote of the landowners as provided by sections 2-2410 to 2-2417."

Section 2-2413, R. S. Supp., 1957, provides: "The Secretary of State shall examine the petition and, if he finds that it bears the requisite number of signatures and otherwise meets the requirements of sections 2-2410 to 2-2427, he shall order that the question of the organization of such district be submitted to a vote of the electors living within the proposed district. He shall also fix the date of such election, which may be held either as a special election or at any general election. Such election shall be so scheduled that the notice required by section 2-2414 can be given."

Section 2-2414, R. S. Supp., 1957, provides: "The Secretary of State shall give notice of the scheduling of such election to the election commissioners, or county clerks in those counties not having an election commis-

sioner, of each county to be embraced in whole or in part within such district. Such notice shall contain a statement of the question to be submitted at such election, the area in which such election is to be held, and the date thereof."

Section 2-2423, R. S. Supp., 1957, provides: "The board of directors may levy and collect each year the taxes necessary to finance the activities of such district to the amount of not more than one mill on the dollar of the assessed value of all taxable property except intangible property within such district. It shall, on or before the first day of August in each year, certify its mill levy to the county clerks of the counties wholly or partially within the district, who shall extend the same on the county tax list, and the same shall be collected by the county treasurer in the same manner as state and county taxes. It shall be the duty of the board to apply for and to receive from the county treasurers all money to the credit of the district. The county treasurer shall disburse the same on the order of the treasurer of the district."

Section 2-2424, R. S. Supp., 1957, provides: "All claims against weather control districts may be paid by warrants or orders, duly drawn on the treasurer of such district, signed by the president and countersigned by the secretary. When such warrants or orders have been issued and delivered, they may be presented to the treasurer of the district, and if such be the fact, endorsed 'not paid for want of funds.' Such warrants or orders shall be registered by the treasurer in the order of presentation, shall draw interest at the rate of seven per cent per annum from the date of registration thereof, and shall be received by the county treasurer in payment of weather control district taxes levied pursuant to section 2-2423."

Section 2-2426, R. S. Supp., 1957, provides: "If there are no debts outstanding, the board of directors may, on its own motion, or on the written request of twenty-

five electors, request of the Secretary of State that the question of dissolution of such district be submitted to the electors of the district, and the Secretary of State shall fix the date of such election, notice of which shall be given and which shall be conducted in the same manner as elections for the formation of such districts. If a majority of those voting on such question vote in favor of dissolution, the Secretary of State shall so certify to the board of directors, which shall thereupon stand dissolved. The question of dissolution shall not be submitted more often than once every twelve months. In case a district is dissolved the funds on hand or to be collected shall be held by the treasurer, and the directors shall petition the district court of the county in which the main office is located for an order approving the distribution of funds to the taxpayers of the district on the same basis as collected."

In determining the defendants' first assignment of error relating to the constitutionality of the act we consider only one ground which we believe discloses that the act is unconstitutional. The following authorities are applicable.

In determining whether or not any legislation is valid, it is proper to examine and ascertain what may be done or accomplished pursuant to said legislation. See Rowe v. Ray, 120 Neb. 118, 231 N. W. 689, 70 A. L. R. 1056.

In Elliott v. Wille, on rehearing, 112 Neb. 86, 200 N. W. 347, this court had under consideration the constitutionality of an act authorizing the formation of a district for the distribution of electric light, heat, and power. This court said: "If the statutes, when fairly construed, authorize and sanction the taking of private property without just compensation, or deprive persons of their property without due process of law, then such legislation must be held invalid." The court further said: "* * * when a petition praying for the formation of a district for the purpose of distributing light, heat or power by the use of electric current, and for the

election of three directors of such proposed district, setting forth the boundaries of the proposed district, the estimated cost of the distribution system and the method proposed for raising necessary funds, whether by bonds or special tax, and signed by not less than 10 per cent of the freeholders of the proposed district, is filed with the county board, it then becomes the duty of such board to order a special election within the proposed district. At this election all who are electors under the general election laws and reside in the proposed district may vote, and, if a majority of the votes cast at such special election is in favor of the proposed district, it then becomes a district. The district may then, through its officers, proceed to construct a distribution system and to levy taxes or issue bonds to defray the cost of the system. * * * The statutes in question make no provision for a tribunal to determine whether any lands have been unjustly included in or excluded from the district, or whether the organization of a particular distribution district will be for the public convenience or welfare, save and except the action of the petitioners and their self-selected electorate. * * * Where a legislative act permits the organization of districts, for the construction of a public improvement, by private individuals, to be paid for by a tax on all the property in the district, and no provision is made for a hearing by any tribunal as to the right of property owners who may be injuriously affected or wrongfully included within the district, it may result in the taking of private property for a public purpose without just compensation, and in the taking of private property without due process of law." In the light of the above language, the legislation involved in Elliott v. Wille, *supra,* was declared unconstitutional.

The similarity of the sections of the statutes involved in Elliott v. Wille, *supra,* and the case here involved, insofar as the constitutional issues are involved, is noted. There appears to be no significant difference.

Under the act here involved, a person living outside the district but owning property within the proposed boundaries of the district has no voice in the forming of the district. Such owner is not accorded the opportunity to protest the inclusion of his property within the district. Under the act here involved, a landowner has no opportunity to be heard by a competent tribunal on the question of whether the proposed district will benefit the public health, welfare, and convenience, or upon the question of whether his property has been arbitrarily or unjustly included within the boundaries of the district, regardless of whether the landowner lives within or without the boundaries of the district.

It will be observed by reading the sections of the act heretofore set forth that it contains all of the defects found to be involved in the case of Elliott v. Wille, *supra,* that is, that the act authorizes individuals to create and fix boundaries of a district for a public improvement to be paid for by taxation levied upon property within the district, without containing any provision for determination by a competent tribunal of whether the creation of the district and the construction of the public improvement will promote public health, convenience, or welfare, and without any provision for determining whether the owners of property have been arbitrarily and unjustly included within the district, or whether the property will receive any benefit from the proposed district.

As we view the act, it violates Article I, section 3, of the Constitution of Nebraska, which provides: "No person shall be deprived of life, liberty, or property, without due process of law." It also violates Article I, section 21, of the Constitution of Nebraska, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Another case which we believe decisive of the constitutionality of the act here involved is Nickel v. School

Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. This was an action to enjoin certain officials, whose duty it was to do so, from assessing and levying a tax against plaintiffs' lands located in school district R-1 for the support thereof. The district had been established under the Reorganization of School Districts Act, Laws 1949, c. 249, p. 673. The constitutionality of the act was involved. The court, quoting from Rowe v. Ray, *supra,* said: "'It is a rule of general recognition that the formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries of such municipal corporations are legislative functions. Among the decisions of this court which recognize this rule are: City of Wahoo v. Dickinson, 23 Neb. 426; State v. Dimond, 44 Neb. 154; City of Hastings v. Hansen, 44 Neb. 704; Bisenius v. City of Randolph, 82 Neb. 520; Winkler v. City of Hastings, 85 Neb. 212; Elliott v. Wille, on rehearing, 112 Neb. 86.'"

The appellants in the case of Nickel v. School Board of Axtell, *supra,* contended the act was unconstitutional because it permitted complete freedom of choice by a county committee in the selection of boundaries of any proposed school district and thus permitted it, by gerrymandering, to discriminate between persons and property. In taking up this phase of the case the court quoted from Elliott v. Wille, *supra,* as follows: "'The fixing of boundaries of a political subdivision of a state into counties or districts for public purposes is a legislative function. The legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. Where the latter course is pursued, there must be some provision for determining whether the particular district is for the public health, convenience or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially

determined. The legislature may not delegate to private individuals either legislative or judicial functions. Where a legislative act permits the organization of districts, for the construction of a public improvement, by private individuals, to be paid for by a tax on all the property in the district, and no provision is made for a hearing by any tribunal as to the right of property owners who may be injuriously affected or wrongfully included within the district, it may result in the taking of private property for a public purpose without just compensation, and in the taking of private property without due process of law.' "

The defendants contend the trial court erred in failing to find that section 23, L. B. 633, Sixty-ninth Session of the Nebraska Legislature, 1959, legalized and validated all proceedings taken and acts done in the organization and creation of the district.

The Nebraska Legislature in its Sixty-ninth Session enacted L. B. 633, which appears in chapter 9, page 107, Laws 1959, the subject matter being weather control districts. It was titled: "AN ACT relating to weather; to provide for weather control districts; to provide for their organization; to provide the procedures, powers, and duties thereof; to provide for the dissolution thereof; to provide for jurisdiction of the courts as prescribed; to provide that such districts shall have power to tax as prescribed; to make certain acts unlawful; to provide penalties; to provide how this act may be cited; to provide a savings clause for districts organized under a prior law; and to repeal sections 2-2410 * * * (to) 2-2427, Revised Statutes Supplement, 1957." This law was approved June 25, 1959. It is in fact a new law relating to the subject of weather control districts.

Article III, section 27, of the Constitution of Nebraska, provides in part: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the

Legislature shall, by a vote of two thirds of all the members * * * otherwise direct."

Neither the preamble nor body of L. B. 633 above described contains an expression of an emergency. Consequently, L. B. 633 did not take effect until 3 calendar months after the adjournment of the Sixty-ninth Session of the Nebraska Legislature, or on September 28, 1959.

The motions for new trial in this case were filed under date of June 11, 1959, and overruled on July 15, 1959. The notice of appeal in this case was given by the defendants on August 14, 1959, and jurisdiction of the case was lodged in this court prior to September 28, 1959, the effective date of L. B. 633 which purports to validate the proceedings taken under the act involved in the instant case.

It is obvious from what has been said above that the trial court did not have an opportunity during the trial of the case here considered to pass upon the validity of L. B. 633. All the proceedings relating to the case here involved had been heard by the trial court and judgment rendered as previously stated. In the light of what has been said above on this phase of the case, the defendants are in no position to raise the validity of L. B. 633 as being a constitutional act passed by the Legislature and curing the defects appearing in the act here considered.

In the case of City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771, we said that a case must be determined on the law as it stands when judgment is rendered therein. See, also, Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

The defendants' contention is without merit.

Other issues raised by the plaintiff as to why the act here involved may be considered unconstitutional need not be determined.

For the reasons herein set forth, the judgment of the trial court is affirmed.

AFFIRMED.

MARY LANNING MEMORIAL HOSPITAL, A CORPORATION, APPELLANT, V. CLAY COUNTY, NEBRASKA, APPELLEE.

101 N. W. 2d 510

Filed March 11, 1960. No. 34726.

1. **Paupers: Counties.** There is no common-law liability upon a county to support poor and indigent persons. Any liability must arise by statute imposing such duty upon the county and prescribing the manner of its discharge.
2. **Counties.** The extent of the liability of a county must be found in the legislation creating the duty.
3. **Paupers: Counties.** The county board of each county is the overseer of the poor and is vested, by statute, with the entire and exclusive superintendence thereof in such county, whether such poor persons be residents or nonresidents.
4. ———: ———. Whether a person comes within the purview of the pauper statutes, so as to be entitled to the relief therein provided, is a question of fact to be determined by the county board in each particular case.
5. **Counties.** The powers of a county are limited to those prescribed by statute, and a county board can discharge a statutory obligation only by the statutory means provided by the Legislature.
6. **Paupers: Counties.** An obligation against a county for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated by the statutes specifically providing the method for doing so.
7. **Statutes.** All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intent.
8. **Paupers: Counties.** Our opinion in Marshall v. County of Nance, 163 Neb. 252, 79 N. W. 2d 417, clarified.

APPEAL from the district court for Clay County: EDMUND NUSS, JUDGE. *Affirmed.*

Stiner & Boslaugh, for appellants.

J. T. Massie, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ.

WENKE, J.

This is an appeal from the district court for Clay

County. It involves the disallowance of a claim filed by Mary Lanning Memorial Hospital of Hastings, Nebraska, against the relief fund of Clay County, Nebraska, for various hospital services rendered to Oscar F. Freytes. The background out of which this claim arose is as follows:

On Tuesday evening, July 1, 1958, Oscar F. Freytes was injured when he was hit by an automobile while on foot on highway No. 6 in Clay County, Nebraska. He was thereupon taken to and received by the Mary Lanning Memorial Hospital in Hastings, Nebraska. Freytes was a nonresident of Nebraska, being a resident of the State of California. His then economic status brought him within the class to which section 68-114, R. R. S. 1943, has application. Freytes' injuries were critical and needed immediate attention to prevent his death. Because of this emergency situation Dr. Robert Smith, who was on the staff of the hospital, gave Freytes immediate attention. Freytes survived his injuries and stayed in the hospital until after October 31, 1958. The charges of the hospital for his care, which are admittedly the fair and reasonable value thereof, total $1,766.39 from July 1 through October 31, 1958. A claim for this amount, on a form furnished to the hospital by the director of public welfare of Clay County, was filed with the county clerk of Clay County on November 29, 1958. This is the first direct contact the hospital made with any Clay County authorities who, under the statute, are authorized to deal with services of this character. The Clay County board of supervisors rejected the claim on December 2, 1958. Appeal from the disallowance thereof by the board of supervisors was taken to the district court for Clay County. Trial was had therein on March 19, 1959, jury being waived. The court, on July 21, 1959, found generally for the defendant and rendered a judgment accordingly. The hospital filed a motion for new trial and took this appeal from the overruling thereof. We have and will hereinafter re-

fer to appellant Mary Lanning Memorial Hospital as the hospital; to appellee Clay County, Nebraska, as Clay County; and to the Clay County Board of supervisors as the county board.

Within a day or two following Freytes' entry into the hospital James W. Kenney, administrator thereof, and Dr. Robert Smith, who was then on the staff of the hospital, each separately called Addie Storrs, the then director of public welfare of Clay County, and advised her about Freytes, and the fact that he had been injured in an accident in Clay County and was in the hospital. Both the administrator and doctor thereafter talked to Addie Storrs on several different occasions while Freytes was in the hospital. They testified that during these conversations the director, although she denies doing so, indicated to them that Clay County would be responsible for Freytes' care and, from these conversations, they were under the impression that Clay County would take care of Freytes' bill and relied thereon. However, they both admitted the director had never absolutely said that Clay County would do so. Although the director contacted the county board shortly after the administrator of the hospital called her the first time and advised them of what the manager had told her, the record shows that no one from or for the hospital ever directly contacted the county board in regard thereto until this claim was filed on November 29, 1958.

A jury having been waived, ordinarily the following principle would be controlling: "Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence." Neill v. Dakota County, 140 Neb. 26, 299 N. W. 294. See, also, Miller v. Banner County, 127 Neb. 690, 256 N. W. 639. However, the material facts here controlling are not in dispute and the case presents one of law.

The question presented is, does the hospital, under the factual situation here established, have a right to recover from Clay County the fair and reasonable value of the various hospital services which it rendered to Oscar F. Freytes, a nonresident poor person, who was injured in Clay County?

Our search of the statutes fails to disclose any provision therein giving the director of public welfare of Clay County authority to bind Clay County for this type of service, even if she had tried to do so, which she denies, and none is pointed out by counsel for the hospital. In the absence thereof she was without authority to do so. See, Marshall v. County of Nance, 163 Neb. 252, 79 N. W. 2d 417; Hamilton County v. Meyers, 23 Neb. 718, 37 N. W. 623.

In order to get the situation clearly before us as it existed at the time these services were rendered it would be well to go over the law on this subject from the very beginning. At common law the county would not be liable for the relief of the poor for there is no common law liability upon any governmental unit to support poor and indigent persons. The liability, if any, must arise by virtue of statutes making it the duty of the county to do so. See, Marshall v. County of Nance, *supra;* Neill v. Dakota County, *supra;* State ex rel. Boxberger v. Burns, 132 Neb. 31, 270 N. W. 656; Cerro Gordo County v. Boone County, 152 Iowa 692, 133 N. W. 132, 39 L. R. A. N. S. 161; Patrick v. Town of Baldwin, 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613. As stated in Marshall v. County of Nance, *supra:* "There is no common-law liability upon a county to support poor and indigent persons. Any liability must arise by a statute imposing the duty upon the county and prescribing the manner of its discharge."

This state, from its inception, has had laws pertaining to the care of paupers. See Chapter 40, Paupers, Sections 1 to 23, R. S. 1866, which is now Chapter 68, article 1, Paupers, R. R. S. 1943. It deals with both non-

residents and those having legal settlement in the various counties of this state.

The Legislature has the power to impose upon a county the burden of relief of the poor and destitute and to prescribe the method of discharging that duty unless such power is limited by the Constitution. Our Constitution has no prohibition against such legislation. State ex rel. Boxberger v. Burns, *supra.* The extent of the liability of a county must be found in the legislation creating the duty. Marshall v. County of Nance, *supra.* The liability of the county is purely statutory. Cerro Gordo County v. Boone County, *supra.*

The county board of each county is the overseer of the poor and is vested, by statute, with the entire and exclusive superintendence thereof in such county, whether such poor persons be residents or nonresidents. Miller v. Banner County, 135 Neb. 549, 283 N. W. 206.

Whether a person comes within the purview of the pauper statutes, so as to be entitled to the relief therein provided, is a question of fact to be determined by the county board in each particular case. See, Marshall v. County of Nance, *supra;* State ex rel. Boxberger v. Burns, *supra.* When the statutes, such as ours, expressly make it the duty of the county to provide for poor persons it is mandatory, subject, however, to such limitations as are provided in other statutes relating thereto. Marshall v. County of Nance, *supra;* State ex rel. Boxberger v. Burns, *supra.*

We said early in the history of the state that: "The law must be so construed as to make it effective, otherwise it would be in the power of the authorities having charge of the poor to neglect or refuse to relieve the destitute." Gage County v. Fulton, 16 Neb. 5, 19 N. W. 781. See, also, Sayre v. Madison County, 127 Neb. 200, 254 N. W. 874, 93 A. L. R. 896. And, as stated in Marshall v. County of Nance, *supra:* "If the county board or other public officers, charged with the care of the poor and indigent, arbitrarily refuse to perform the

mandatory duty imposed upon the county, appropriate legal remedies may be employed." See, also, Patrick v. Town of Baldwin, *supra;* Cerro Gordo County v. Boone County, *supra.*

Prior to 1947 the statutes dealing with the subject of paupers had no express provisions providing for the manner of county boards discharging their duties in regard to the subject matter herein involved except the authority to employ a county physician or physicians. See § 68-104, R. S. 1943. Generally we have held, in the absence of such express provisions, that when there is opportunity to consult local authorities, previous authorization for rendering such services must be secured from those who have authority to dispense such charities in order to have a valid claim therefor. See, Marshall v. County of Nance, *supra;* Neill v. Dakota County, *supra;* Hamilton County v. Meyers, *supra.* However, we have either indicated or held that no such previous authorization is required in emergency cases, such as herein involved, holding in such cases that if the necessary services are rendered the law imposes an obligation upon the county to pay the reasonable value thereof. See, Burnham v. Lincoln County, 128 Neb. 47, 257 N. W. 491; Miller v. Banner County, 127 Neb. 690, 256 N. W. 639; Hamilton County v. Meyers, *supra.* There are, however, cases which hold that although an emergency existed it was either not controlling or would not permit recovery. See, Miller v. Banner County, 135 Neb. 549, 283 N. W. 206; State ex rel. Boxberger v. Burns, *supra;* Sayre v. Madison County, *supra.*

With this situation before it the 1947 Legislature amended section 68-104, R. S. 1943, which section designated the county board of each county in the state as overseers of the poor therein, which would include both nonresident and those having settlement therein, and vested such county board with the entire and exclusive superintendence of such poor. The 1947 legislation added to section 68-104, R. S. 1943, the following

language: "In providing medical and hospital care for the poor, the county board shall make use of any existing facilities, including tax supported hospitals and charitable clinics so far as the same may be available. *The county board shall have authority to arrange or contract for medical, surgical and hospital services* at such rates as may be determined *and the county shall not be liable for any such services not expressly authorized by the county board.*" See Laws 1947, c. 218, § 1, p. 705. (Emphasis ours.) As amended, this statute is now section 68-104, R. R. S. 1943.

"The powers of a county are limited to those prescribed by statute, and a county board can discharge a statutory obligation only by the statutory means provided by the legislature." State ex rel. Boxberger v. Burns, *supra.* See, also, Marshall v. County of Nance, *supra.* An obligation against a county for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated by the statutes specifically providing the method for doing so. See Patrick v. Town of Baldwin, *supra.* Where a statute contemplates that certain liabilities for the support of the poor shall rest on contract that is the exclusive and only way of incurring them. See, Patrick v. Town of Baldwin, *supra;* Cerro Gordo County v. Boone County, *supra.* We said as early as Hamilton County v. Meyers, *supra,* that: "Whatever may have been the moral duties of the county, we must deal alone with its legal obligations." Then, in State ex rel. Boxberger v. Burns, *supra,* we said: "If the emergency must be met, the legislature within constitutional limits under our system of government should take cognizance of it." And, as stated in Cerro Gordo County v. Boone County, *supra:* "Doubtless some provision for emergencies exacting quick action should be made, but that is a matter for the Legislature and not the courts." Unless the amendment was intended to cover all situations dealing with the subject therein covered, in-

cluding emergencies, it would serve little or no purpose in view of our former holdings. We find the requirements of section 68-104, R. R. S. 1943, have application and are controlling.

But the hospital contends, in effect, that the amendment to section 68-104, R. S. 1943, by the 1947 Legislature should not be so construed as to defeat the rights of a nonresident to those benefits to which he is entitled under section 68-114, R. R. S. 1943, and which, as it claims, it was the duty of the county board to furnish to Freytes under the circumstances here established. We think the following principles have application here:

"All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intention." State ex rel. Menard v. Nichols, 167 Neb. 144, 91 N. W. 2d 308.

"All statutes in pari materia must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision." Chicago & N. W. Ry. Co. v. City of Seward, 166 Neb 123, 88 N. W. 2d 175.

Sections 68-103 and 68-105, R. R. S. 1943, impose upon the several counties of the state certain obligations as to poor persons having legal settlement therein and the duty of the county board of each county in regard thereto, whereas, section 68-114, R. R. S. 1943, imposes certain obligations upon a county as to nonresident poor under circumstances therein set forth, and duties upon the county board of such counties when such nonresidents become sick or in distress therein and likely to suffer because thereof. Section 68-104, R. R. S. 1943, as already stated herein, vests in the county board of each county in the state, who are therein made the overseers of the poor, the entire and exclusive superintendence of the poor of such county which, under the entire act relating to paupers, would include both resident and nonresident poor persons. Therefore in apply-

ing the provisions of section 68-104, R. R. S. 1943, they should be considered as applying to both resident and nonresident poor persons in each county. To hold otherwise would make a different rule applicable in case of an emergency, depending upon whether the poor person entitled to relief was a resident or nonresident, a condition which we are sure the Legislature did not intend and which we are not free to judicially impose. Insofar as medical, surgical, and hospital services for poor persons in the county are concerned we think the requirements in regard thereto as provided by the 1947 Legislature has application to both resident and nonresident poor persons who, under the statutory provisions, are entitled thereto.

But the hospital contends that we have recognized the emergency rule as being in effect since the 1947 amendment to section 68-104, R. S. 1943, by reason of our holding in Marshall v. County of Nance, *supra*. It is true that therein we referred to our holding in Miller v. Banner County, 127 Neb. 690, 256 N. W. 639, in case of an emergency and went on to say: "But in the absence of an emergency situation, such matters must be handled with the county authorities charged with the duty of caring for the poor." No emergency was involved in Marshall v. County of Nance, *supra,* and we did not therein consider the amendment to section 68-104, R. S. 1943, by the 1947 Legislature, and the effect thereof. The most that can be said of the foregoing quoted language is that it was dicta and not here controlling.

Having come to the conclusion that the hospital did not comply with the requirements of section 68-104, R. R. S. 1943, as it relates to medical, surgical, and hospital services, it cannot, under the circumstances here disclosed, hold Clay County liable therefor even though an emergency existed as to the need therefor by Freytes at the time he entered the hospital after he was injured and, because of that fact, the judgment of the trial court

denying the hospital claim should be and is affirmed.

The hospital undoubtedly could have avoided most of the difficulty it now finds itself in if, at the very first opportunity after Freytes was admitted, it had presented the matter directly to the county board for if the county board had arbitrarily refused to perform the mandatory duty imposed upon it by section 68-114, R. R. S. 1943, appropriate legal remedies could have been taken to enforce that duty.

AFFIRMED.

PHYLLIS L. SUNDERMAN, APPELLANT, V. BEATRICE WARDLAW, APPELLEE.
101 N. W. 2d 848

Filed March 18, 1960. No. 34684.

1. **Automobiles.** A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor.
2. **Trial.** If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case.
3. **Automobiles.** The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from the facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.
4. ———. The phrase "without giving compensation therefor" as contained in section 39-740, R. R. S. 1943, indicates an intention on the part of the Legislature not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver.
5. ———. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere

gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.

6. ———. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.

APPEAL from the district court for Gage County: ERNEST A. HUBKA, JUDGE. *Affirmed.*

John J. Wilson, Healey, Wilson & Barlow, and *Patrick W. Healey,* for appellant.

Fred Vette, Vasey & Rist, and *Cline, Williams, Wright & Johnson,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Gage County. It involves an action by Phyllis L. Sunderman against Beatrice Wardlaw for the purpose of recovering compensation for damages which she claims she suffered by reason of injuries sustained in a car accident. Plaintiff alleges the accident which resulted in her injuries was caused by negligence of the defendant in operating her car while plaintiff was riding therein as a passenger. Trial was had to a jury and, at the conclusion of all the evidence, the trial judge found that plaintiff was not riding in defendant's car as a passenger but as a guest and submitted the case to the jury accordingly. See § 39-740, R. R. S. 1943. The jury returned a verdict for defendant. Plaintiff filed a motion for new trial and this appeal was taken from the overruling thereof.

Two questions are raised by the appeal. The first is, was the trial court in error by holding, as a matter of law, that the appellant was, under all the evidence adduced, a guest rather than a passenger while riding

in appellee's car? The second is, does the record present an issue of fact as to whether appellant was riding with appellee as a guest or as a passenger?

The accident in which appellant was injured happened about 6:45 a. m., on Thursday, October 25, 1956, at a point on U. S. Highway No. 30 about 15 miles west of Omaha, Nebraska, and just east of where One Hundred Eightieth Street crosses that highway on what we shall herein refer to as the Dodge Road. At the time of the accident appellee was driving her car, a 1954 Chevrolet sedan, east on Dodge Road, which is a four lane surfaced highway. Riding with her were appellant and four other ladies from Beatrice, Nebraska, all of whom were members of the Beatrice chapter of the Does. As appellee was driving east on Dodge Road she approached and passed a "jalopy" and then a truck, doing so by driving on the inner lane for eastbound traffic. Shortly after she had passed the truck appellee endeavored to return to the outer lane for eastbound traffic but as she was doing so the rear end of her car swerved or fishtailed, then spun completely around, and went over the shoulder to the right or south side of the highway, down a 25 to 50 foot embankment, and into a cornfield at the base thereof. As a result of the accident appellant was very seriously and permanently injured.

The Does, which is an auxiliary of the Elks, is a nonprofit fraternal organization which engages in secret ritualistic work. There is a local chapter of the Does in Beatrice, Nebraska, and, at the time, it had a drill team which participated in the secret ritualistic work of the lodge for which the members received no compensation. All six ladies riding in appellee's car at the time of the accident were members of this drill team, appellant being an "attendant" and appellee a "flag bearer." They were all going to Omaha for the sole purpose of attending the state meeting of the Does and to participate in secret ritualistic work as members of the Beatrice chapter's drill team.

State meetings of the Does are held periodically and some of the chapters are asked to exemplify some aspects of the secret ritualistic work of the order at these meetings in order to perfect it, that is, the work done is criticized and corrections suggested for the purpose of improving the work of the members of the drill teams participating, both individually and collectively. Such a meeting was called for October 25, 1956, to be held in Omaha, Nebraska, and the Beatrice chapter was advised it was to participate therein and exemplify some phase of the ritualistic work by demonstration or drill. It should be stated that the officers of the lodge and members of a drill team, when asked to participate in such work, are expected to go as part of their loyalty to the lodge but are not required to go if business or family obligations prevent them from doing so. If a member cannot go someone is substituted in her place.

When the local lodge was advised it was to participate in the work at the Omaha meeting the officers and drill team prepared to do so, having practice sessions for that purpose. However, no transportation was provided by the lodge for those who expected to attend nor were any arrangements made by the lodge for that purpose; that is, everyone was left to provide her own means of transportation for getting to the state meeting in Omaha. The lodge did, however, make arrangements to pay the registration fee of each one attending, which included a lunch and banquet dinner. Some of the officers and members of the drill team planned to go up to Omaha the night before the meeting but appellee planned to drive up early the morning of the day of the meeting and come back the same night after the banquet. Appellant learned of this fact and asked appellee if she could ride with her. Appellee told her she was welcome to go. No arrangements or suggestions of any kind were made that appellant was to pay for the ride. Appellee picked up the ladies riding in her car early on the morning of October 25, 1956, leaving Beatrice about

4:45 a. m., after doing so. The car proceeded on U. S. Highway No. 77 to Lincoln, then on U. S. Highway No. 6, until they reached and entered onto U. S. Highway No. 30, or the Dodge Road at a point about 1 mile west of where the accident occurred.

Section 39-740, R. R. S. 1943, insofar as herein material, provides: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle * * * because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

It is necessary in this case, in order to arrive at a decision herein, to determine the status of appellant while she was riding in appellee's car, that is, was she a guest or a passenger? The burden of establishing her status as a passenger was on appellant. Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716.

In Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, we said: "A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor." See, also, Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623.

Was there an issue of fact for the jury on this question? We said in Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, that: "If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case." Here the evidence on this material issue is not in dispute and clearly presents an issue for decision by the court as a matter of law.

But appellant contends when, as here, the carriage

promotes the mutual interests of both the rider and the operator and the purpose of both in making the trip is identical then the court should hold the rider is a passenger and not a guest. We have heretofore set forth certain rules whereby the question of whether or not the rider has given compensation for the trip such as to make her a passenger instead of a guest can be determined.

"The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

"The phrase 'without giving compensation therefor' (Comp. St. Supp. 1939, section 39-1129, now section 39-740, R. R. S. 1943) indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Born v. Estate of Matzner, *supra*.

"A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Gunn v. Coca-Cola Bottling Co., 154

Neb. 150, 47 N. W. 2d 397; Paxton v. Nichols, *supra;* Born v. Estate of Matzner, *supra.*

"A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation." Born v. Estate of Matzner, *supra.*

That the trip to Omaha was motivated solely by the fact that the appellee, as well as the other five ladies riding in her car, wished to go to Omaha to attend the state meeting of the Does and there take part in a demonstration of secret ritualistic work by the officers and drill team of the Beatrice chapter of Does and that certain benefits could flow to them individually or collectively therefrom, is established by the evidence but we do not think the benefits flowing therefrom, if any, are of such a tangible and substantial character as to remove appellant from the status of a guest to that of a passenger. Rather, we think, the benefits conferred, if any, are incidental to the social and fraternal interests and companionship of members of the chapter and not such as to provide compensation within the meaning of the statute so as to make appellant a passenger.

Both appellant and appellee have cited cases from other jurisdictions based on comparable or somewhat similar fact situations under comparable or similar statutes. Some of the cases cited would support the result herein reached while others would not. However, we see no useful purpose in citing and discussing these cases because, as we have already stated, each case must stand on its own facts and those facts must be gauged by the standards which we have heretofore determined should be applied thereto. That different courts apply different standards to similar or comparable statutes and thus reach different results under similar or comparable fact situations is fully evidenced by the text of 4 Blashfield, Cyclopedia of Automobile Law and Prac-

tice (Perm. ed.), § 2292, p. 305, on the subject of "Who are Guests within Operation of Guest Statutes" and the cases cited thereunder, as well as the cases cited by the parties in their briefs. Under the standards we have set forth as herein controlling, we think the evidence establishes, as a matter of law, that appellant was riding in appellee's car as a guest.

The case was submitted to the jury on that basis and a verdict was rendered for appellee. In view thereof, we do not find it necessary to determine the question of whether or not the evidence as to appellee's negligence, if any, was sufficient on which to base a finding of gross negligence. We do not pass on that question and consequently do not set out the facts relating thereto.

AFFIRMED.

IN RE ASSESSMENT AND VALUATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.
101 N. W. 2d 856

Filed March 18, 1960. No. 34713.

1. **Taxation: Appeal and Error.** An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to this court.
2. **Taxation: Railroads.** The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment and it may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained.
3. **Taxation: Trial.** Generally, there is a presumption that when an assessing authority values property for taxation purposes it acts fairly and according to law upon sufficient evidence to sus-

tain its conclusion but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be decided from evidence, unaided by presumption, and the burden of establishing an illegal assessment is upon the complaining party.

4. **Taxation: Railroads.** It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property.
5. **Taxation.** A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes.
6. **Taxation: Railroads.** It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value.
7. **Taxation: Constitutional Law.** Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay.
8. **Estoppel.** A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party.

APPEAL from the State Board of Equalization and Assessment. *Order reversed. Judgment of assessment rendered.*

J. W. Weingarten and *Eldon Martin*, for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton*, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This controversy concerns the assessment of the property of appellant in Nebraska by appellee for the purpose of all ad valorem taxes, except municipal taxes, for the year 1959. Appellant made a return or schedule of its property as of March 31, 1959, to appellee in all respects as required by the statute. § 77-603, R. R. S. 1943. Appellant appeared at a hearing before appellee on May 4, 1959, and produced evidence relative to the value of its property. Appellee on July 15, 1959, found and determined that the actual value of the property of appellant in Nebraska subject to assessment for taxation purposes by appellee was $153,326,173 and it assessed the property, after deducting locally assessed property of appellant, at the sum of $52,744,745.

The complaint of appellant concerning the assessment made by appellee alleged in substance the following: The true, actual value of the property of appellant in Nebraska in 1959 did not exceed $112,974,922, it should be assessed at 35 percent thereof or not to exceed $38,-621,807 after deduction of locally assessed property, and $14,122,938 of the assessment made by appellee was in excess of the lawful and just assessment of the property of appellant in Nebraska. The property was assessed by appellee at not less than 46 percent of the true, actual value thereof and substantially all other taxable property in Nebraska in 1959 was assessed at not to exceed 35 percent of its actual value. The assessment of the property of appellant was unlawful, discriminatory, in violation of the constitutional requirement of the state that taxes shall be levied by valuation uniformly and proportionately upon all property and franchises, and in violation of the statutory mandate that the property of appellant shall be assessed on the identical basis as other tangible property. The assessment appropriates the property of appellant without due process of law, denies the equal protection of the law, and

takes its property for public use without compensation in violation of provisions of the Constitution of Nebraska. The assessment of $52,744,745 was contrary to the evidence produced at the hearing before appellee, was unlawful and discriminatory, was capriciously made by the use of erroneous methods and fundamentally wrong principles, and was accomplished by arbitrarily increasing the true, actual value of the property of appellant to $153,326,173 before assessing it at 35 percent of actual value. The complaint asked appellee to set aside the assessment of the property of appellant and to determine the assessed value thereof for 1959 to be $38,621,807 as required by law.

A hearing was held by appellee on July 28, 1959, at which time additional evidence was introduced by appellant. Its complaint was that day denied and the original assessment of the property of appellant was affirmed by appellee. This appeal is a challenge of the legality of the recited actions of appellee.

The authority of this court in a proceeding of this character is by legislative mandate to hear and determine the matter in controversy de novo upon the record. § 77-617, R. R. S. 1943.

Appellee is charged with the obligation of assessing property of railroads and railroad corporations in the state except designated items outside of right-of-way and depot grounds. § 77-601, R. R. S. 1943. The Legislature has not defined any method by which railroad property in the state shall be valued for taxation by appellee. The Legislature has directed that specified things shall be considered but it has not prescribed any definitive formula for ascertaining value. That is committed to the judgment and discretion of appellee to be exercised fairly within legal limitations and restrictions. Appellee may resort to any method by which a substantially just and correct determination of the value of such property can be reached if it includes consideration of the things which the statute requires.

This court in Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114, remarked: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. * * *." The opinion in that case states: "The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property."

In Great Northern Ry. Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, it is said: "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have." See, also, State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, 133 Neb. 640, 276 N. W. 391; Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222; Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696.

Appellee determined the actual value, referred to by it as system value, of the railroad property of appellant by a consideration of three factors: 5-year, 1955-1959, average value of the stocks and bonds; 5-year, 1954-1958, average of net operating income capitalized at 6 percent; and investment in transportation property less depreciation. Each factor was given equal weight and this resulted in an average value of the railroad property of appellant of $451,177,807. This was the actual value of the railroad of appellant for assessment purposes as determined by appellee. Appellee then decided the proportion or share of this value that should be allocated to Nebraska because of the part of the property of appellant therein. This was determined by

a consideration of four factors referred to by appellee as allocation factors: Current track mileage, car and locomotive miles, traffic units, and gross earnings or operation revenue in Nebraska compared with the same factors in other states where the property of appellant is located. The component average of the four factors was 25.04 percent. This, applied to the total value of the railroad, designated system value by appellee, of $451,177,807, produced $112,974,922 described as the value allocated to Nebraska. This was the actual value of the property of appellant in Nebraska in 1959 subject to taxation as determined by appellee but it did not take 35 percent of $112,974,922, the value allocated to Nebraska by it. Instead it reduced that amount by 5 percent or to $107,326,175, multiplied that figure by 1.4286 thereby increasing the amount to $153,326,173, and labeled it "actual value." Appellee then took 35 percent of that amount or $53,664,160, deducted the amount of local assessment of $919,415, which resulted in $52,744,745, and that was made by appellee the 1959 assessment of the property of appellant in Nebraska. The assessment described above from which this appeal was taken is exhibited by the following:

I SYSTEM VALUE

a. 5-year average value stocks and bonds

1955	$ 373,633,444	
1956	360,350,195	
1957	391,482,791	
1958	397,774,657	
1959	372,538,031	
	5) $1,895,779,118	$379,155,823

b. 5-year average net operating income capitalized at 6%

1954	27,748,529
1955	26,490,403
1956	25,542,287

1957		21,001,392	
1958		23,672,803	
		5)$ 124,455,415	
		24,891,083	
		.06	414,851,383
c. Investment in transportation property less recorded depreciation, $688,859,609, less 10%, less 5%, less 5%			559,526,216
		3)$1,353,533,422	
Average System Value			$ 451,177,807

II ALLOCATION FACTORS

a. Current track mileage	28.21%
b. Car and locomotive miles	24.03%
c. Railway traffic units	24.60%
d. Operating revenue	23.33%
Average	25.04%

III ALLOCATION OF COMPUTED VALUE

Average system value $451,177,807 x 25.04%= $112,974,922 value allocated to Nebraska

IV ASSESSMENT

In 1957 and 1958 the allocated computed value less 5% equals "basic value" or 70% of actual value. Therefore, the allocated computed value in 1959 less 5% equals 70% of actual value. Therefore, $112,974,922 less 5% equals $107,326,175. $107,326,175 x 1.4286=$153,326,173 actual value

35% statutory percent

	$ 53,664,160
Less local assessment	919,415
1959 State Board assessment	$ 52,744,745

The evidence in this case was all introduced in the record by appellant. There was no evidence offered by or on behalf of appellee. There is a presumption that when an assessing authority values property for taxation purposes it acts fairly and legally upon sufficient evidence to sustain its action but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be determined from evidence, unaided by presumption, and the burden of showing an improper assessment is upon the complaining party. State ex rel. Bee Building Co. v. Savage, *supra;* Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307.

There is undisputed evidence of the actual value of the entire property of appellant in 1959 as shown by the market value of its stocks and bonds, its capitalized earning power, and its investment in transportation property less depreciation. It is not true, as appellee asserts, that there is no showing by appellant that actual value of the property is different than that determined by appellee. There is no evidence or legal justification to warrant the increase from $112,974,922 to $153,326,173 in the actual value of the property of appellant as was done by appellee as shown by section IV entitled "Assessment" of the order of appellee of July 15, 1959. The resort to the device of the multiplier or conversion factor of 1.4286 was occasioned by statutory change from assessment of tangible property at full value to 50 percent thereof in 1953, to 50 percent of what was termed basic value in 1956, and to 35 percent of actual value in 1957. The 50 percent of full value law applied to all tangible property in 1953, 1954, and 1955. The 50 percent of basic value law governed assessments in 1956 and 1957. The law requiring assessment of tangible

property at 35 percent of actual value became and has been effective since September 20, 1957. It governed 1958 and 1959 assessments. § 77-201, R. S. Supp., 1953; § 77-201, R. S. Supp., 1955; § 77-201, R. S. Supp., 1957.

In each of the years 1953, 1954, and 1955 appellee found the system value of the property of appellant by use of the identical three factors used in 1959, determined the actual value of the Nebraska property by allocating to it a percent of the system value in the same manner as it did in 1959, and fixed the assessment each year at 50 percent thereof. It is clear that in each of those years appellee determined the actual value of the property of appellant by use of the identical three factors or elements of value used by appellee in 1959 in arriving at what it labeled system value.

Appellee on July 11, 1956, declared by resolution "that the basic value of all tangible property and real property assessed in the State of Nebraska for 1956 has been determined to be 70 per cent of actual or market value." The value of the railroad system of appellant for 1956 was determined by appellee as it had been in the years 1953, 1954, and 1955 by the average of three factors: Stocks and bonds, capitalized net operating income, and the investment account less depreciation; and by allocating 25.23 percent thereof, the average of the four factors used in previous years, the value of the Nebraska property of $118,353,152 was obtained which appellee termed allocated value and which was no greater or different than actual value. Instead of taking 70 percent of that amount in accordance with the resolution noted above, appellee declared the basic value of the property of appellant in Nebraska to be $112,435,495 which was exactly 95 percent of the allocated value.

In 1957 appellee, by the same items and procedure, determined what it termed in its order "system value" of the property of appellant in the amount of $468,361,700 and an "allocated value (Nebraska)" of the Nebraska property of appellant in the amount of $117,746,130. Ap-

pellee then stated the basic value was $111,858,825. That was 95 percent and not 70 percent of the $117,746,130 as the law required to arrive at basic value. This is obviously admitted by the reference in section IV of the 1958 assessment order of appellee in which it is said: "1957 Computed Value - 5%=Basic Value." This was clearly saying that 5 percent was deducted from the allocated value of 1957 which was the actual value of the Nebraska property for that year and the balance, 95 percent, was treated as basic value. The 1957 assessment was made on that erroneous basis. It is not important that appellee designated the $117,746,130 as allocated value because the factors used clearly show it was actual value.

Appellee substantially concedes that the basic value used in 1956 and 1957 was 95 percent of what is labeled by it as allocated value. Appellee could hardly do otherwise because simple arithmetic demonstrates it. The factors employed in composing allocated value establish that it was the actual value of the Nebraska property of appellant in the years 1956 and 1957. The market value of stocks and bonds, the earning power of the property, and the cost as shown by the investment account less proper depreciation evidence actual value. Appellee recognizes and, in fact, argues this in its brief when it says: "We submit that the authorities support the use of a cost factor, along with other factors in the determination of the value of a railroad for tax purposes."

There was no attempt by appellee in either 1956 or 1957 to state in the assessment order how or why it arbitrarily determined that the basic value was 95 percent of what was clearly the actual value of the Nebraska property of appellant while basic value of all other tangible property was established by the resolution of appellee at 70 percent of actual or market value. The omission was an obvious disregard and violation of the statute which required that appellee in making an

assessment of railroad property "shall set forth the manner in which it arrived at the assessment, the several items included in the total assessment and the manner of arriving at the several items and the total." § 77-609, R. R. S. 1943.

The value of the railroad system of appellant in 1958 was determined by appellee by the average of the same factors of value used in the preceding years as discussed above. Twenty-five percent thereof was allocated by the identical method formerly used for that purpose. That resulted in the sum of $113,548,106, designated by appellee as computed value for the Nebraska property and that was the same character of finding arrived at by the same method as had previously been considered and treated as the actual value of the Nebraska property of appellant. Appellee reduced that figure by 5 percent, multiplied the remainder by 1.429, and obtained $154,147,230 which it called actual value. At the time the assessment was made on July 8, 1958, appellee adopted a resolution which contained a recitation that "the method of determining the actual value of real estate and tangible personal property for the year 1958 used by all County Assessors is to convert 'basic value' for 1957 to actual value by multiplying the basic value by 1.429." Ironically, appellee also recited in the resolution that it was "convinced that railroad property should be valued at 35% of actual value as is all other tangible property" and at the identical time, as shown by the resolution, appellee valued and assessed the property of appellant in Nebraska at very much more than 35 percent of actual value because this property had not been valued and assessed at 70 percent of actual value in 1957 but at 95 percent of actual value and, notwithstanding this important fact, the conversion factor of 1.429 was applied to the value of the Nebraska property of appellant in 1958 as found by appellee to arrive at what it called actual value.

The 1959 assessment by appellee of the railroad of

appellant was made by the same method as the 1958 assessment was accomplished. The identical factors were employed for finding system value and for allocating 25.04 thereof, the average of the four factors used in previous years, which produced $112,974,922 which appellee called value allocated to Nebraska. Appellee reduced that amount by 5 percent or to $107,326,175 and multiplied that by 1.4286, 100 divided by 70 carried to the fourth decimal instead of 1.429 used by it in 1958, which resulted in $153,326,173 which appellee called actual value. The 35 percent statutory rate was applied to the last amount which produced, after deducting locally assessed property, an assessment for 1959 of the Nebraska property of appellant of $52,744,745.

The authority and obligation of appellee were to assess the property of appellant on the same basis as other tangible property is required to be assessed. §§ 77-601 and 77-604, R. R. S. 1943. All tangible property was required to be valued at its actual value and to be assessed for 35 percent of such actual value. § 77-201, R. R. S. 1943. Actual value as used in the revenue statute is defined by section 77-112, R. R. S. 1943. Appellee, by the procedure exhibited by the first three sections of the assessment order of 1959, substantially observed the requirements of this section of the statute. Section I a found the system value as evidenced by the selling price of the stocks and bonds of appellant, which responds to item (6) of the statute, "market value in the ordinary course of trade." Section I b found system value as evidenced by capitalizing the net operating railroad income, which is item (1), "earning capacity of the property." Section I c found system value as shown by investment account less deduction for physical and economical obsolescence, which appellee agrees is in lieu of item (4), "reproduction cost less depreciation." The remaining three items of the statute, "(2) relative location; (3) desirability and functional use"; and "(5) comparison with other properties of known or recog-

nized value," may be considered as included in market value and earning capacity to the extent they are applicable.

The assumption and the result of each of the three sentences of section IV of the assessment order of 1959 made by appellee are incorrect factually and are contrary to law. The 1957 or 1958 allocated value less 5 percent did not equal basic value or 70 percent of actual value as that formula assumed and stated. In the 1957 assessment instead of appellee taking 70 percent of allocated value as basic value it took 95 percent of allocated value as basic value. That error, resulting in over-assessment, was repeated and given effect by appellee to the prejudice of appellant as hereinbefore noted in the assessment of 1958. The error of the first sentence inheres in each of the other sentences of section IV.

There was no necessity of fact or justification of law for the resort by appellee to a reduction of 5 percent of the amount of the valuation allocated by it in 1959 to Nebraska or for the use by it of a multiplier or conversion factor in ascertaining the actual value of the property of appellant in Nebraska. The use of these was arbitrary and a violation of the statute defining actual value. The use of them disregarded the undisputed evidence that the actual value of the Nebraska property of appellant did not exceed $112,974,922, the amount appellee found and described as value allocated to Nebraska. Appellee found that the system value of appellant was $451,177,807. Included in this amount was every possible value of the railroad of appellant, including its franchise or its right to exist. Appellee made no attempt to demonstrate that there was any omission of anything of value from the schedule of the property of appellant furnished to appellee in 1959. It was accepted, acted upon without objection, and everything therein was valued and included in what appellee termed system value in its assessment order. Appellee belatedly now says in this court that the statute requires

it to assess railroad property "together with franchises"; that the record does not show that it made a separate valuation of franchises; and that it may be presumed it considered the element of franchise rights in arriving at actual value. This may be accepted if appellee means by actual value $112,974,922, designated as value allocated to Nebraska. Otherwise it is incorrect because franchise value was included in the assessment by use of the factors used by appellee to reach what is termed system value. The following from State ex rel. Bee Building Co. v. Savage, *supra,* fully explains the matter of franchise value in making such an assessment: "Where the property of a railroad corporation is assessed by the state board of equalization as a unit, and in fixing the value thereof the board takes into consideration the fact that the property is being used for effectuating the objects of the corporation, is earning an income in the transportation of passengers and carrying of freight for hire, and that such corporation is exercising the rights, powers and privileges of corporations organized for the purpose of engaging in business as common carriers, such assessment, so made, would include and cover the intangible as well as the tangible property of the corporation, and would be an assessment of its franchise."

The system value fixed by appellee of $451,177,807 is and must be accepted as the 1959 actual value of the entire railroad property of appellant. Any contention otherwise is only a play on words without evidentiary integrity or legal justification. The practice by appellee of reducing the value assigned to appellant in Nebraska by 5 percent originated in 1957. It is not set out or expressed in the assessment order of that year except as it results from the finding that the Nebraska property had a value for that year of $117,746,130 and that the basic value thereof was $111,858,825, or exactly 5 percent less than the total value first stated above. This practice and error reoccurred in 1958 and 1959. The deduc-

tion of 5 percent of the value assigned to Nebraska in each of those years was arbitrary and without explanation or any reason therefor given in the respective orders of assessment of appellee for those years. The reason suggested in this litigation by appellee that the allocated value "was 5% more than basic value" is not convincing. Appellee had fixed basic value at 70 percent of actual value of all tangible property for taxation purposes. The allocated value assigned to the Nebraska property was a finding of actual value of the property by all the applicable evidence in the record. If it was not, the appellee did not in any of these years find what the actual value of the property was in which event it had no basis for finding the basic value of it. Appellee deducted 5 percent of the value allocated to Nebraska and called it basic value when it should have deducted 30 percent to arrive at basic value according to the order fixing the ratio of basic value to actual value. The indulgence of appellee in making an unexplained 5 percent deduction from the value of the property to be assessed and in resorting to such terms as "system value," "computed allocated value," and to an inappropriate and incorrect conversion factor when its primary inquiry mandated by the Legislature was only to find actual value of the property to be assessed was a resort to fictions. A fiction is not allowed to obscure the facts when the facts become important. The important facts which the fictions tended to obscure in 1958 and 1959 were that in 1956 and 1957 appellee took 95 percent of the actual value of the Nebraska property of appellant for basic value rather than 70 percent, which the law required, and based the assessment of the property thereon. Appellee then applied to the incorrect amounts found for those years a conversion factor of 1.429 in 1958 and 1.4286 in 1959 which was in any event only permissible when the actual basic value of the property had been fixed at 70 percent of actual value and thereby appellee added in 1959 a nonexistent amount of

more than $40 million to the actual value of the property of appellant in this state.

Appellee assigned 25.04 percent of the total value of the railroad as found by it of $451,177,807 to the Nebraska property of appellant. This allocation is uncontested. The amount of it is $112,974,922. That is the actual value of the property in 1959 concerned in this litigation and the duty of appellee was to assess it at 35 percent. §§ 77-201 and 77-604, R. R. S. 1943.

The action of appellee in inflating the value of the Nebraska property of appellant to $153,326,173 by the devices it used was arbitrary and unreasonable. It is conceded by the parties that 25.04 percent was the value of the railroad system in Nebraska. On the basis of those figures, when properly projected, there is produced an actual value of more than $612 million for the entire railroad. This is more than $225 million in excess of what appellee found all of the outstanding stocks, bonds, and equipment obligations were worth at market prices. The assessment is in defiance of that recognized standard of value. This court has said that a consideration of the value of the stocks and bonds of a solvent railroad is a fair method of ascertaining its value. Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, *supra*. It is about $200 million in excess of the valuation found by appellee by capitalizing $24,891,083, the net operating income of appellant averaged for 5 years, as prescribed by the Interstate Commerce Commission. The earnings of a railroad are evidence of a most important character in determining the value of the railroad. State ex rel. Bee Building Co. v. Savage, *supra;* Chicago, R. I. & P. Ry. Co. v. State, *supra*.

The three items or factors used by appellee to arrive at the total value of the railroad property produced an actual value of $112,974,922 for the Nebraska property and that is more than $40 million less than the alleged actual value upon which the assessment is based. Appellee destroyed any trace of reasonableness or

realism by deducting 5 percent from that amount and multiplying the remainder by 1.4286 to produce a value of $153,326,173 which appellee called the actual value of the Nebraska property.

The original assessment order of July 15, 1959, was adopted by only two members of the board voting for it. One member voted against it, one member abstained from voting, and one member was absent. The use of the matter contained in section IV of the order of assessment was not a mistake, an inadvertence, or because of insufficient information. It was done advisedly and arbitrarily. The Tax Commissioner of the state advised against the use of it and presented a proposed order of assessment wholly eliminating that formula. The Tax Commissioner advised appellee that the facts and the law required a reduction in railroad valuations for assessment purposes. One of the members who voted for the assessment order as it exists for 1959 said in a voluntary, formal statement he would never be a party to extending the type of relief suggested to any special interest at the unavoidable tax expense of Nebraska farmers, main street merchants, and homeowners. However, the same statement tacitly conceded that railroad property had been overassessed and this was illustrated by a reference to 1955 when the "valuation should have declined because of the change in base, it actually increased 5 million dollars." The other member who supported the 1959 assessment order said he opposed any concessions to any special interest group when the average taxpayer would have to make up the difference from his own pocket. Neither of these members mentioned anything concerning the value of the property to be assessed nor did they undertake to show where the judgment of the Tax Commissioner was wrong. After the views of the two members were expressed as indicated above the Tax Commissioner stated that appellee had no right to consider such an effect among taxpayers and that its only right and duty were to make an as-

sessment of railroads at the same level as all other assessments. He said if appellee was to refuse to reduce values because other taxpayers will make up the difference, then no taxpayer, whatever his status or station, could ever get relief from unjust taxation. The observations in Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146, are appropriate: "The case is not one of mere errors in judgment in following a proper method, * * * but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity." The record justifies the conclusion that the 1959 assessment of the Nebraska property of appellant is, in the respects discussed above, arbitrary and capricious.

Laflin v. State Board of Equalization & Assessment, 156 Neb. 427, 56 N. W. 2d 469, contains the following: "It is the duty of the Board to fix the value of farm lands and improvements at their actual value at the time they are appraised for assessment purposes. Any attempt to depart from this provision of the statute * * * constitutes a noncompliance with legislative direction. * * * The record shows on its face that the Board did not value farm lands and improvements for assessment in the various counties on the basis of the actual value, their value in the market * * *. This being so, the final orders of the Board are in violation of the positive directions of applicable statutes * * *. We are of the opinion that appellant's appealable interest lies in the fact that the record shows that farm lands and improvements in the various counties in the state are not assessed at actual value as defined by the statute and that there has been no uniformity of assessment between the various counties of the state under the formula used by the Board even if such formula could be assumed to correctly represent the actual value of this class of property throughout the state. Under such circumstances the final order of the Board is not in compliance with law

and must be deemed to be an arbitrary valuation of this class of property."

K-K Appliance Co. v. Board of Equalization, 165 Neb. 547, 86 N. W. 2d 381, presented a situation similar to this. The assessor in that case raised the value of the stock of merchandise a substantial amount. The basis for the raise was a count made of the various appliances involved and an examination of advertisements in certain newspapers. No attempt was made to ascertain the model, quality, or other pertinent facts for comparative purposes. The order of assessment was set aside. The opinion states: "If it be shown that the method employed was in fact arbitrary or speculative, having no real relation to the value of the property being assesssed, it will not sustain the valuation thus fixed, and renders any raise in the assessment based exclusively thereon entirely void. * * * A casual examination of the method employed by the county assessor in fixing the actual value of plaintiff's stock of merchandise shows its want of reasonableness in the accomplishment of this result. The yardstick employed was purely an arbitrary one which lacked many vital elements for determining actual value. Any resemblance to actual value resulting from its use would be nothing more than sheer coincidence. Valuations of property for tax purposes cannot be supported by such evidence. We necessarily hold that the raising of the basic value of the property contained in plaintiff's inventory is arbitrary and void, and cannot be sustained."

In Matzke v. Board of Equalization, 167 Neb. 875, 95 N. W. 2d 61, the contested assessment was based on an actual valuation of $28,685. The evidence of the owner established an actual value of $15,500. The assessment was arrived at by taking 52 percent of the replacement cost of $94,881 or $45,542, from which 40 percent was deducted for functional depreciation, leaving a balance of $27,325 as the actual value of the building and $1,360 for the land. The useful life of the building was 50

years. In condemning this method of assessment this court said: "There is no showing in the record to explain or justify a physical depreciation of only 52 percent on a 43-year-old building with a useful expectancy of 50 years. The physical depreciation of the building by 52 percent was the result of arbitrary action by the county board of equalization. * * * The only basis in the record on which the building could be depreciated on account of age produces a depreciated value, under the formula employed, which would result in an actual value less than $15,500, the actual value established by the plaintiffs. * * * In Newman v. County of Dawson, *supra* (167 Neb. 666, 94 N. W. 2d 47), we approved a formula for determining the value of tangible property for taxation purposes where it was shown to comply substantially with section 77-112, R. S. Supp., 1955 * * *. But where the formula applied requires the use of an arbitrary figure to arrive at a result, the result is as arbitrary as the figure itself. * * * A formula for determining the value of tangible property for taxation purposes must tend to produce the result required by section 77-112, R. S. Supp., 1955, when applied uniformly and impartially. Where it appears that an arbitrary basis is used which is not uniformly applied to all tangible property the result is an arbitrary one. It will not sustain a valuation for tax purposes."

In Adams v. Board of Equalization, 168 Neb. 286, 95 N. W. 2d 627, this court accepted evidence of value presented by the taxpayer as actual value of the property involved because the evidence showed that the assessment was based on a computation of 74 percent of replacement cost less 6 percent as basic value when the basic value had been determined to be 70 percent of actual or market value. The assessment was set aside. The opinion contains the following: "He said he applied to the replacement cost the depreciation listed in the manual which was 6 percent, a purely arbitrary percentage, and this resulted in a figure of $30,360 which

was described as the physical value. The result was necessarily an arbitrary one. There is no evidence to justify the deduction or depreciation of 6 percent of the alleged replacement cost. That deduction supports an inference that the replacement cost was neither the actual nor fair market value."

The method employed by appellee in assessing the property of appellant in Nebraska as exhibited by section IV of its assessment order of 1959 resulted in the assessment of the property at 47½ percent of its actual value as found by appellee and described in the order as value allocated to Nebraska. The facts of the assessment may be correctly and simply stated as follows:

Actual value	$112,974,922
Assessment	47½%
	53,664,160
Less local assessment	919,415
1959 State Board assessment	$ 52,744,745

All tangible property has since September 20, 1957, been required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The evidence establishes that all tangible property except railroad property was assessed at not more than 35 percent of its actual value. It is not important in the circumstances of this litigation that some tangible property other than railroad property was assessed for less than 35 percent of its actual value. The Constitution provides that taxes shall be levied by valuation uniformly and proportionately upon all tangible property, subject to exceptions not important to this case. Art. VIII, § 1, Constitution of Nebraska.

State ex rel. Bee Building Co. v. Savage, *supra,* contains this language: "And this rule of uniformity applies not only to the rate of taxation but as well to the valuation of property for the purposes of raising revenue. * * * From the foregoing it is altogether clear

that in the discharge of the duties incumbent on the state board of equalization as an assessing board it was the duty of the members thereof, or a majority of them, to, in the manner and by the methods pointed out by the legislature, ascertain the fair and reasonable value of all of the properties of whatsoever kind owned by the corporations subject to taxes in this state, which it was their duty to assess, and to value such properties for the purposes of taxation so that the owners thereof should be required to pay a tax in proportion to the value of their property uniform, so nearly as was practicable, with the standard of values generally placed on all other species of property throughout the state, which is assessed by the different assessing officers selected for that purpose in the manner provided by law. It would be unfair to the railroad corporations to assess their properties in this state at a greater valuation than that which prevails in the assessment of property generally * * *."

In Chicago, R. I. & P. Ry. Co. v. State, *supra,* this court said: "To assess one class of property at 68 per cent. to 75 per cent. of its actual cash value, and to value the property of another taxpayer at 100 per cent. of its actual cash value, constitutes an unlawful discrimination, which is prohibited by the Constitution and statutes of the state."

Laflin v. State Board of Equalization & Assessment, *supra,* in speaking of the function of the State Board of Equalization and Assessment, said: "In so doing (assessing property at its actual value), the objective is not only to assess taxable property at its actual value but also to secure a uniform and proportionate valuation for taxation purposes as required by Article VIII, section 1, Constitution of Nebraska."

Greene v. Louisville & I. R. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E 88, states: "Discrimination resulting from an assessment of the intangible property of a railroad corporation by the

Board of Valuation and Assessment at 75 per cent. of its actual value while the property of individuals and other classes of corporations, taxed at the same rate, is generally and systematically assessed * * * at not more than 60 per cent. of actual value, is violative of the provisions of the Kentucky Constitution requiring uniform taxation in proportion to value and an identical rate as between corporate and individual property * * *; and this has been recognized by the Supreme Court of the State."

The court said in City Ry. Co. v. Beard, 283 F. 313: "Where a state Constitution provides that all taxable property shall be assessed by a uniform rule at its true value in money, if that rule is not observed, and the basis of valuation is 60 per cent., or any per cent. less than 100, the courts will grant relief to those whose property is rated in excess of the adopted percentage."

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979, reversed the determination of this court (105 Neb. 843, 182 N. W. 485) that a taxpayer whose property was assessed at 100 percent of its value and property generally was assessed substantially at less value, had no remedy except to urge upon public authorities the duty of raising the other property valuation up to the level of the complainant. It is therein stated: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

Cumberland Coal Co. v. Board of Revision of Tax Assessments, *supra*, referred to the case last quoted and said: "In applying this principle, the fact that a uni-

form percentage of assigned values is used, cannot be regarded as important, if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same."

Schleman v. Connecticut General Life Ins. Co., 151 Fla. 96, 9 So. 2d 197, states: "Valuations for taxation must have a just relation to real value of the assessed property, and there must be no substantial inequality in valuation in various kinds of taxable property, and if steps required to be taken in making valuations are not actually taken in good faith, the valuations are shown to be essentially unequal, abstractly or relatively, the assessment is invalid."

It is said in People ex rel. McDonough v. Illinois C. R. R. Co., 355 Ill. 605, 190 N. E. 82: "Where taxing authorities in assessing property for taxation take an assessed value below the actual cash value of the property the constitutional rule of uniformity in taxation must be observed, and the tax commission, having knowledge of the percentage of actual value taken for assessment purposes throughout the State, cannot assess the property of a railroad company at a greater per cent of its actual value than that at which other property is assessed."

In Pacific Telephone & Telegraph Co. v. Wooster, 178 Wash. 180, 34 P. 2d 451, the court said: "* * * the evidence is conclusive that the so-called equalized valuation will raise the assessed valuation of each of respondent's parcels of real estate * * * seventeen per cent above the assessed valuation of land similarly situated * * *

throughout the county. It seems too plain for argument that to pick out the property of a particular owner and raise the assessed valuation of his property substantially above the assessed valuation of property of a like character similarly situated, violates the uniformity and equality provision of article VII, § 2, of the state constitution. * * * If the basis of valuation is the true market value of the property, then that basis must be applied to all alike. If the basis is a certain per cent of the true market value, the same percentage must be applied to all alike."

In People ex rel. Miller v. Chicago B. & Q. R. R. Co., 300 Ill. 399, 133 N. E. 325, the court said: "It has been held by this court that taxing authorities have no justification in withdrawing any property from the protection of the constitutional principle of uniformity of taxation, as uniformity of taxation is required under the constitution, and that a person cannot be compelled to pay a greater proportion of taxes, according to the value of his property, than another property owner. * * * While it is true that error in the exercise of an honest judgment in fixing the value of property will not invalidate the tax, it is also true that an arbitrary violation of the rule of uniformity is an invasion of constitutional right and will not be tolerated * * *."

The difference between 47½ percent and 35 percent when applied to the very large valuation involved in this case is not substantial or approximate uniformity as contended by appellee and as required by the Constitution and the applicable statute of the state. Appellee applied the percentage of 1.4286 to 95 percent of the actual value of the railroad property and to 70 percent of the actual value of other tangible property. The fact that a uniform percentage was used is not important. The discrimination between railroad property and other tangible property and the overvaluation of the former resulted from the deliberate act of appellee refusing to apply the conversion factor to the same basic valuation.

As a result of such discrimination in the use of the conversion factor alone, apart from any other formula error, the property of appellant is assessed at 47½ percent of its actual value and other tangible property is assessed at or not more than 35 percent of its actual value. The circumstances of this case, as discussed in the foregoing, characterize the assessment of the Nebraska property of appellant for 1959 as arbitrary, unreasonable, and discriminatory.

An assignment by appellant is that appellee erred in its computation of the value of the system property of appellant as evidenced by the investment account by deducting less than 20 percent therefrom for physical and economic obsolescence resulting in the sum of $559,526,216 for the system property when the evidence establishes without dispute that not less than 40 percent should be deducted because of obsolescence; that would result in a value based on the investment account of $413,315,765 for the system railroad property; and that appellee was wrong in using the larger amount in its computation of the value of the Nebraska property of appellant.

This challenge is not available to appellant in this case. The complaint of appellant objecting to the assessment of its 1959 property in Nebraska by appellee alleged that by accepted, recognized, lawful, and proper methods the total actual value of the property of appellant was computed by appellee and a fair and just proportion of such system value resulted in the sum of $112,974,922 as the value of the Nebraska property of appellant; and that instead of appellee fixing the assessed value of the property at 35 percent of the value assigned to Nebraska as required by law, which would have resulted in an assessment of $38,621,807 after deduction of locally assessed property, appellee arbitrarily, unreasonably, and erroneously deducted 5 percent therefrom and multiplied the remainder by 1.4286 to obtain the sum of $153,326,173 which it termed the actual value of the

property in Nebraska. This resulted in an unlawful and discriminatory assessment of $52,744,745 after deduction of locally assessed property when it should have been assessed in the sum of $38,621,807. The assessment made by appellee was $14,122,938 in excess of a lawful, just, and proper assessment. Appellant by its complaint asked appellee to set aside its assessment and fix the assessed value of the property of appellant in Nebraska for 1959 in the sum of $38,621,807 as required by law. This was in compliance with the requirements of the statute that the assessment could be contested by appellant filing with appellee a complaint stating wherein it complained the assessment was unjust, stating the amount appellant claimed it should be, the excess therein, and asking appellee for an adjustment in the assessment. § 77-612, R. R. S. 1943.

A prerequisite of an appeal by appellant was a notice within 10 days of the assessment to appellee stating that an appeal was to be taken to this court from the assessment, the amount appellant claimed the assessment should be, and the amount of the excess. § 77-613, R. R. S. 1943. The notice of appeal of appellant said the assessment of its property in Nebraska ought to be the sum of $38,621,807 and the assessment thereof by appellee was $14,122,938 in excess of that amount.

An assignment of error in this court by appellant is that appellee erred in not vacating its assessment of $52,744,745 of the 1959 Nebraska property of appellant and in not assessing the property in the sum of $38,621,-807, which, obviously, would have required a valuation of the Nebraska property in the sum of $112,974,922.

The taking of an appeal by appellant required appellee to make a return to the respective county clerks of the counties in which any portion of the railroad property was located, stating the amount of the assessment made by appellee and the amount appellant claimed it was in excess of the true value. Thereupon the taxing boards of the respective counties were authorized to

levy and collect taxes under the assessment against the railroad property upon the uncontested value of the assessment. § 77-619, R. R. S. 1943. Appellant stated at the submission of this case that levies are being extended and taxes collected on the uncontested part of the assessment of $38,621,807.

Appellant, as is obvious from the foregoing, repeatedly asserted that its Nebraska property in 1959 had an actual value of $112,974,922. Included in the computation by which that value was ascertained was the amount of investment in transportation property as depreciated. Appellant by its statements and acts above referred to agreed that the procedure of appellee was correct in that respect and that it produced a correct result. It was only the increased amount produced by deducting 5 percent from the actual value of the property and using the conversion factor to which appellant objected. Appellant may not now claim inconsistently with its previous position that the use of the investment account as one factor in arriving at the Nebraska property was wrong and thereby attempt to secure an additional reduced valuation of its Nebraska property.

Jensen v. Omaha Public Power Dist., 159 Neb. 277, 66 N. W. 2d 591, contains the following: "The rule seems to be: 'Subject to modifications and limitations which will appear (none of which are present in the present case), it is a well established principle that a party who has knowingly and deliberately assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party. * * *' 31 C. J. S., Estoppel, § 117, p. 372."

It is also stated in 31 C. J. S., Estoppel, § 117, p. 375: "It is frequently held that estoppel against inconsistent positions in judicial proceedings will operate where the position first assumed has been successfully maintained. * * * It follows that there may be an estoppel

where there has been no judicial determination of the merits of the initial position. Thus, before any determination has been reached as to the position first taken, and while still relying thereon, a party cannot also rely on an inconsistent position * * *." See, also, Cozad Ditch Co. v. Central Nebraska Public Power & Irr. Dist., 132 Neb. 547, 272 N. W. 560; Peterson v. Strayer, 121 Neb. 587, 237 N. W. 667, on rehearing, 121 Neb. 866, 239 N. W. 213; In re Estate of Nilson, 126 Neb. 541, 253 N. W. 675; Blid v. Blid, 82 Neb. 294, 117 N. W. 700; Kirkendall v. Weatherley, 77 Neb. 421, 109 N. W. 757, 9 L. R. A. N. S. 515; 19 Am. Jur., Estoppel, § 50, p. 650, § 72, p. 704.

The findings of appellee contained in sections I, II, and III of its assessment order of July 15, 1959, concerning the property of appellant are correct and they are each adopted by this court.

The assessment of the 1959 property of appellant in Nebraska as contained in section IV of the assessment order of appellee of July 15, 1959, should be and it is hereby reversed.

It should be and is adjudged that the actual value of the property of appellant for 1959 in Nebraska is the sum of $112,974,922; that from 35 percent thereof or $39,541,222 there should be deducted the value of the locally assessed property of appellant the sum of $919,415; and that the 1959 assessment of the property of appellant in Nebraska should be and is $38,621,807.

ORDER REVERSED. JUDGMENT OF ASSESSMENT RENDERED.

IN RE ASSESSMENT AND VALUATION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY.
CHICAGO AND NORTH WESTERN RAILWAY COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

101 N. W. 2d 873

Filed March 18, 1960. No. 34714.

1. **Taxation: Appeal and Error.** An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to this court.
2. **Taxation: Railroads.** The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment and it may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained.
3. **Taxation: Trial.** Generally there is a presumption that when an assessing authority values property for taxation purposes it acts fairly and according to law upon sufficient evidence to sustain its conclusion but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be decided from evidence, unaided by presumption, and the burden of establishing an illegal assessment is upon the complaining party.
4. **Taxation: Railroads.** It was the duty of the State Board of Equalization and Assessment to value railroad property in Nebraska in 1959 at its actual value and to assess it at 35 percent thereof and any departure therefrom was a noncompliance with the legislative mandate and constitutes an arbitrary valuation and assessment of the property of appellant.
5. **Taxation.** A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes.
6. **Taxation: Railroads.** It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at not less than 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value.

7. **Taxation: Constitutional Law.** Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay.
8. **Taxation: Railroads.** It is generally permissible for assessment authorities in ascertaining the value of the interstate operating property of a railroad for taxation purposes to consider its investment in transportation property determined, according to the rules of the Interstate Commerce Commission, in conjunction with the average value of its stocks and bonds during a reasonable period antecedent to the time of the valuation of the property and the capitalization at a reasonable rate of the average net operating income of the railroad during a like period, and it was not arbitrary or unreasonable for the State Board of Equalization and Assessment to do so in its 1959 assessment of railroad property.
9. ———: ———. The assessing authorities in determining the proportion of the value of the entire operating property of an interstate railroad allocable to its interstate property in a single state may consider the percentage that the intrastate traffic units, gross earnings, car locomotive mileage, and current mileage bear to the total railroad system.
10. ———: ———. A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings.
11. ———: ———. The capitalization by the State Board of Equalization and Assessment of the average net income of a railroad for a 5-year period immediately antecedent to the time of the assessment of the property of the railroad at the rate of 6 percent as one factor in ascertaining the value of the entire property of the railroad for taxation was not arbitrary or unreasonable.

APPEAL from the State Board of Equalization and Assessment. *Order reversed. Judgment of assessment rendered.*

Gaines, Spittler, Neely, Otis & Moore, Carl McGowan, and *George Hollander,* for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This litigation concerns assessment of the property of appellant in Nebraska by appellee for the purpose of all ad valorem taxes, except municipal taxes, for the year 1959. Appellant made a return or schedule of its property as of March 31, 1959, to appellee in all respects as required by the statute. § 77-603, R. R. S. 1943. Appellant appeared at a hearing before appellee on May 4, 1959, and evidence was produced on behalf of and by appellant relative to the value of its property. Appellee on July 15, 1959, found and determined that the actual value of the property of appellant in Nebraska subject to assessment for taxation purposes by appellee was $20,422,068 and it assessed the property, after deducting locally assessed property of appellant, at the sum of $7,065,723.

The complaint of appellant concerning the assessment was in substance the following: The assessment of $7,065,725 was unjust, discriminatory, and unlawful because it was not less than 62½ percent of the actual value of the property in 1959 and all other tangible property in Nebraska was assessed at not to exceed 35 percent of the actual value thereof. Thirty-five percent of the actual value of the Nebraska property of appellant in 1959 did not exceed the sum of $3,722,170. The finding of appellee that the property of appellant in 1959 had an actual value of $15,047,540 was contrary to and was not sustained by the evidence. The 1959 assessment thereof was made by the use of erroneous and unlawful methods, formulas, and devices. The item or factor of "Investment in transportation property" used by appellee in computing the actual value of the property was erroneous and unlawful because it represents the estimated original cost as determined by the Interstate Commerce Commission as of June 30, 1917,

plus subsequent additions and betterments at cost, less retirements since that date without any allowance for depreciation on about $230 million or 40 percent of such investment at December 31, 1958, which is subject to wear and tear. The historical cost bears no relation to and is not legal evidence of the actual value of the property. The effect of the obsolescence of the branch lines of appellant which comprise a large portion of the railroad system of appellant in Nebraska and the development of other forms of transportation and the effect thereof on traffic carried and revenue earned by appellant in relation to the effect upon the value of the railroad property of appellant are not reflected or recognized in the investment account. This item or factor was first used by appellee in 1954 in deciding the actual value of railroad property for assessment purposes and its use has resulted in unreasonable and illegal discrimination in favor of all tangible property other than railroad property. The value of the property involved results from the use thereof by the public. The earnings produced by the use and the value of the property are measured and determined solely by the selling prices of its stocks and bonds and its earnings, and the net income should be capitalized at not less than 8 percent instead of 6 percent. Appellee in 1958 ascertained what it termed computed value which in fact was actual value of the property, deducted 5 percent from it, and purported to convert the remainder or 95 percent of the computed value into actual value of the property by multiplying it by 1.4286 as a conversion factor. The application of the conversion factor to a base of 95 percent of actual value instead of a base of 70 percent of actual value as applied to all other tangible property, resulted in the valuation of the property of appellant at 135.75 percent of actual value. The equalization by appellee of 35 percent of the purported actual value as determined by it resulted in a final assessment of the property of appellant at 47.5

percent of the actual value thereof while all other tangible property in the state was assessed at not to exceed 35 percent of its actual value. The major portion of the property of appellant in Nebraska, because of the lack of traffic density in the state, was below 500,000 net tons per mile of road which is indicative of economic obsolescence. As a result thereof, as compared to traffic handled in other states in which appellant operates, the use of all track miles as an allocation factor in computing and determining the actual value of the Nebraska property of appellant imports value into Nebraska which cannot be sustained by an equitable appraisal of the railroad property and results in an unjust, inequitable, and discriminatory assessment of the actual value of the property of appellant in Nebraska. The prayer of the complaint was that the 1959 assessment of the property be set aside and that it be valued and assessed for purposes of taxation at the same proportion of its actual value as all other tangible property was assessed in 1959 for taxation purposes but not in excess of $3,722,170.

A hearing was held by appellee on July 28, 1959, at which time additional evidence was introduced on behalf of appellant. Its complaint was that day denied and the original assessment of the property of appellant was affirmed by appellee. This appeal is a challenge of the legality of the recited actions of appellee.

The authority of this court in a proceeding of this character is by legislative mandate to hear and determine the matter in controversy de novo upon the record. § 77-617, R. R. S. 1943.

Appellee is charged with the obligation of assessing property of railroads and railroad corporations in the state except designated items outside of right-of-way and depot grounds. § 77-601, R. R. S. 1943. The Legislature has not defined any method by which railroad property in the state shall be valued for taxation by appellee. The Legislature has directed that specified

things shall be considered but it has not prescribed any definitive formula for ascertaining value. That is committed to the judgment and discretion of appellee to be exercised fairly within legal limitations and restrictions. Appellee may resort to any method by which a substantially just and correct determination of the value of such property can be reached if it includes consideration of the things which the statute requires.

This court in Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114, remarked: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. * * *." The opinion in that case states: "The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property."

In Great Northern Ry. Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, it is said: "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have." See, also, State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, 133 Neb. 640, 276 N. W. 391; Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222; Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696.

Appellee determined the actual value, referred to by it as system value, of the entire railroad property by a consideration of three factors: 5-year average value of stocks and bonds, 5-year average of net operating income capitalized at 6 percent, and investment in transportation property. Each factor was given equal weight and this resulted in an average value of the railroad

property of appellant of $224,506,367. It then decided the proportion or share of the system value that should be allocated to Nebraska on account of the part of the property of the appellant therein. This was determined by what appellee termed were allocation factors: Traffic units, gross earnings, car and locomotive miles, and current track mileage in Nebraska, compared with the same factors in other states where property of appellant was located. The component average of the four factors was 6.7025 percent. This, applied to the actual value of the operating property of the railroad as found by appellee of $224,506,367, resulted in $15,047,539. This was the actual value of the Nebraska property of appellant in 1959 subject to taxation as found by appellee but it did not take 35 percent thereof. Instead it reduced that amount by 5 percent to $14,295,162 and multiplied the remainder by 1.4286, thereby increasing the amount to $20,422,069, and labeled it actual value. Appellee then took 35 percent of that amount or $7,147,723, deducted the locally assessed property of $82,000, which resulted in $7,065,723, and that was the 1959 assessment of the property of appellant in Nebraska.

The assessment described above from which this appeal was taken is exhibited by the following:

I	SYSTEM VALUE	
	a. 5-year average net value stocks and bonds	$159,279,000
	b. 5-year net railroad operating income capitalized at 6%	28,474,000
	c. Investment in transportation property, ICC Report Page 200	485,766,102
		3)673,519,102
	Average System Value	$224,506,367
II	ALLOCATION FACTORS	
	Average 6.7025	

III ALLOCATION OF COMPUTED VALUE
$224,506,367 x 6.7025%=$15,047,539

IV ASSESSMENT
In 1957 and 1958 allocated value less 5%= basic value or 70% of actual value. Therefore the allocated computed value for 1959 less 5%=70% of actual value. $15,047,539 less 5%=$14,295,162. $14,295,162 x 1.4286=$20,422,069

$20,422,069	Actual Value
35%	Statutory Percent
$ 7,147,723	
82,000	Local Assessment
$ 7,065,723	State Board Assessment for 1959

The issue on this phase of the appeal is: Does the undisputed evidence establish that the actual value of the 1959 Nebraska property of appellant did not exceed $15,047,539 designated in the assessment order of appellee as allocation of computed value, and was the increase thereof by appellee to $20,422,069 arbitrary, discriminatory, and contrary to law?

The evidence was produced by or on behalf of appellant. There was no evidence by or on behalf of appellee. There is a presumption that when an assessing authority values property for taxation purposes it acts fairly and legally upon sufficient evidence to sustain its action but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be determined from the evidence, unaided by presumption, and the burden of showing an improper assessment is upon the complaining party. Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307.

There is undisputed evidence of the actual value of the entire operating property of appellant in 1959 as established by the market value of its stocks and bonds, its capitalized earning power, and its investment in transportation property less depreciation. It is not true, as appellee asserts, that there is no proof by appellant that the actual value of the property is different from that determined by appellee. There is no proof or legal justification to sustain the increase of the 1959 actual value of the Nebraska property of appellant from $15,047,539 to $20,422,069 as was done by appellee as shown by section IV entitled "Assessment" of the order of appellee of July 15, 1959. The resort to the fiction of deducting 5 percent from the value of the Nebraska property and multiplying the remainder by the conversion factor of 1.4286 was induced by changes in the revenue statutes of the state. The 50 percent of full value law applied to all tangible property in 1953, 1954, and 1955. The 50 percent of basic value law governed assessment of tangible property in 1956 and 1957. The amendment requiring assessment of property of that kind to be valued at actual value and assessed at 35 percent thereof became effective September 20, 1957, and it applied to 1958 and 1959 assessments. § 77-201, R. S. Supp., 1953; § 77-201, R. S. Supp., 1955; § 77-201, R. S. Supp., 1957.

In each of the years 1953, 1954, and 1955 appellee found the value of the entire operating property of appellant by use of the identical three factors used for that purpose in 1959 and called it system value. It determined the value of the Nebraska property of appellant by allocating to it a percent of the system value by the same method it did in 1959; referred to the amount thereof in each of the years 1953 and 1955 as allocated value 100 percent and for the year 1954 as "allocated actual value" of the Nebraska property; and fixed the assessment for each of those years at 50 percent of that value. The record is definite that in

each of those years appellee determined the value of the property of appellant by the use of the same three factors or elements of value used by appellee in 1959 in arriving at what it called system value but which was the actual value of the property of appellant. This is true or appellee did not in any of those years find the actual value of the property as the statute required. There is no showing or explanation in the record of appellee why system value should mean actual value in those years but should not have that meaning in 1959.

Prior to the enactment of the 35 percent of the actual value assessment law all tangible property was valued at its basic value and assessed at 50 percent thereof and the ratio of basic value to actual value was by mandate of the Legislature fixed by appellee. It determined the basic value to be 70 percent of actual value and when the statutory assessment rate of 50 percent was applied, it resulted in a statutory level assessment of 35 percent if basic value had been properly determined in the first instance. The basic value law was amended effective September 20, 1957. The basic value element was eliminated and all tangible property not exempt from taxation was required to be valued at actual value and assessed at 35 percent thereof. §§ 77-112 and 77-201, R. R. S. 1943. Thereafter 100 percent of actual value of property which had been assessed at 70 percent could be, if its value had not changed, readily ascertained by multiplying the assessment of the previous year by the resultant of 100 divided by 70 or 1.4286.

The value of the railroad system of appellant for 1956 was ascertained by appellee as it had been in the previous years discussed above by the average of the identical three factors and the value of Nebraska property was determined by allocating the average of the four factors used in previous years or 6.705 percent. The value of the Nebraska property was thereby pro-

duced as $15,036,635 which appellee termed allocated value but which was no greater or different than but was in fact actual value. Instead of taking 70 percent of that amount in accordance with the resolution fixing the ratio of basic value to actual value, appellee declared the basic value of the Nebraska property of appellant to be $14,284,803 which was exactly 95 percent of the allocated value.

Appellee by the same items and procedure determined in 1957 what it stated was the system value of the property of appellant and allocated 6.683 percent thereof or $14,276,560 as the value of the Nebraska property which was no greater or different than but was in fact the actual value of the property. Appellee then stated the basic value was $13,562,730. That was 95 percent, not 70 percent, of $14,276,560 as the law required to arrive at basic value. The insertion in section IV of the 1958 assessment order of appellee of the Nebraska property of appellant of: "(1957 Computed value 5% = Basic Value)" is an admission of what is said above concerning the 1957 assessment. This is made certain by the immediately following item in the 1958 assessment order: "1958 Computed value 5% = $13,489,047" which is precisely 5 per cent less than the 1958 computed value of $14,198,997. The 1957 assessment of the Nebraska property of appellant was made on that erroneous basis. It is not important that appellee designated the $14,276,560 as allocated value because the factors used and the evidence definitely show it was actual value.

Appellee substantially concedes that basic value used in the 1956 and 1957 assessments was 95 percent of what was labeled by it as allocated value. It could not be otherwise because simple arithmetic demonstrates the factors employed in composing allocated value establish that it was actual value of the Nebraska property of appellant in each of those years. A consideration of market value of stocks and bonds, the earning power of the railroad, and the investment account less depre-

ciation evidences actual value. There was no attempt by appellee in either 1956 or 1957 to disclose by its assessment order or otherwise why it arbitrarily said basic value was 95 percent of what was obviously the actual value of the Nebraska property when basic value of all tangible property was established by the resolution of appellee at 70 percent of actual value. This omission was a disregard and violation of the statute which required that appellee in making an assessment of railroad property "shall set forth the manner in which it arrived at the assessment, the several items included in the total assessment and the manner of arriving at the several items and the total." § 77-609, R. R. S. 1943.

The value of the entire property of appellant in 1958 was determined by the average of the same factors as used in the previous years discussed above and 6.525 percent thereof was assigned by the method used in previous years to the Nebraska property. That resulted in the sum of $14,198,997, designated by appellee as allocation of computed value to Nebraska. That was the same character of finding arrived at by the same method as had been previously considered and treated as actual value of that property. Appellee reduced that amount by 5 percent, multiplied the remainder by 1.429, and produced $19,275,848 which was described as 1958 actual value. The statutory percentage of 35 percent was applied and it resulted in an assessment of $6,746,546. The day of this assessment appellee adopted a resolution which recited that the method of determining the actual value of tangible property for 1958 used by all county assessors is to convert basic value for 1957 to actual value by multiplying the basic value by 1.429. Ironically, appellee also recited in the resolution that it was "convinced that railroad property should be valued at 35% of actual value as is all other tangible property." Its expressed and recorded conviction was not enough to control its action because that identical day, as shown by the same resolution, appellee valued

and assessed the property of appellant in Nebraska at very much more than 35 percent of actual value resulting from the fact that the property had not been valued at 70 percent of actual value in 1957 but at 95 percent of actual value; and, notwithstanding this important fact, the conversion factor of 1.429 was applied to the value of the Nebraska property of appellant in 1958 as found by appellee to arrive at what it called actual value. The conversion factor of 1.429 had no relation to the situation presented by the 1958 assessment. Its use was arbitrary and it produced an equally arbitrary result.

The 1959 assessment of appellant was made by the same method as the 1958 assessment was accomplished. The identical factors were employed for finding system value and the same items were used to ascertain the percentage of the system value that should be assigned to Nebraska which was determined to be 6.7025 percent. It produced $15,047,539 and appellee reduced that amount by 5 percent and multiplied the remainder by 1.4286, 100 divided by 70 carried to the fourth decimal instead of 1.429 used by it in 1958. The result was $20,422,069. The statutory rate of 35 percent was applied to the last amount stated above and that produced, after deducting locally assessed property, an assessment of the Nebraska property of appellant of $7,065,723.

The authority and obligation of appellee were to assess the property of appellant on the same basis as other tangible property was required to be assessed. §§ 77-601 and 77-604, R. R. S. 1943. All tangible property was required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943.

The hypothesis and result of each part of section IV of the assessment order of 1959 made by appellee are incorrect factually and are contrary to law. The 1957 or 1958 allocated value less 5 percent did not equal basic value or 70 percent of actual value as that formula as-

sumed and stated. In making the 1957 assessment instead of appellee taking 70 percent of allocated value as basic value, it treated 95 percent of allocated value as basic value. That error resulted in overassessment, was repeated, and was given effect by appellee to the prejudice of appellant as hereinbefore noted in the assessment of 1958. The error of the first sentence inheres in each of the following parts of the formula.

There was no necessity of fact or jusification of law for the resort by appellee to a reduction of 5 percent of the amount of the valuation assigned by it in 1959 to Nebraska or for the use by it of the conversion factor in ascertaining the actual value of the property of appellant in Nebraska. The use of these was arbitrary and in violation of the statute defining actual value. The use of them disregarded the undisputed evidence that the actual value of the Nebraska property of appellant did not exceed $15,047,539, the amount of the allocation by appellee to Nebraska. Appellee found that the system value of appellant was $224,506,367. Included in this amount was every possible value of the railroad of appellant including its franchise or its right to exist. Appellee made no attempt to demonstrate that there was any omission of anything of value from the schedule of property of appellant furnished appellee in 1959. It was accepted, acted upon without objection, and everything therein was valued and included in what appellee termed system value in its assessment order. Appellee belatedly now says in this court that the statute requires it to assess railroad property "together with franchises"; that the record does not show that it made a separate valuation of franchises; and that it may be presumed it considered the element of franchise rights in arriving at actual value. This may be accepted if appellee means by actual value $15,047,539, the value assigned to Nebraska. Otherwise it is incorrect because franchise value was included in the assessment by use of the factors used by appellee to reach what it termed

system value. The following from State ex rel. Bee Building Co. v. Savage, *supra,* fully explains the matter of franchise value in making such an assessment: "Where the property of a railroad corporation is assessed by the state board of equalization as a unit, and in fixing the value thereof the board takes into consideration the fact that the property is being used for effectuating the objects of the corporation, is earning an income in the transportation of passengers and carrying of freight for hire, and that such corporation is exercising the rights, powers and privileges of corporations organized for the purpose of engaging in business as common carriers, such assessment, so made, would include and cover the intangible as well as the tangible property of the corporation, and would be an assessment of its franchise."

The system value fixed by appellee of $224,506,367 is and must be accepted as the 1959 actual value of the entire railroad property of appellant. Any contention otherwise is only a play on words without evidentiary integrity or legal justification. The practice by appellee of reducing the value assigned to appellant in Nebraska by 5 percent originated in 1957. It is not set out or expressed in the assessment order of that year except as it results from the finding that the Nebraska property had a certain value for that year and that the basic value thereof was exactly 5 percent less than the total value assigned to Nebraska. This practice reoccurred in 1958 and 1959. The deduction of 5 percent of the value assigned to Nebraska in each of those years was arbitrary and without reason therefor given in the respective orders of assessment of appellee. The reason suggested in this litigation by appellee that the allocated value was 5 percent more than basic value is not convincing. Appellee had fixed basic value at 70 percent of actual value of all tangible property for taxation purposes. The allocated value assigned to the Nebraska property was a finding of actual value of the property by all the applicable evidence in the record.

If it was not, then appellee did not in any of those years find what the actual value of the property was in which event it had no basis for finding the basic value of it. The indulgence of appellee making an unexplained 5 percent deduction from the value of the property to be assessed and resorting to an inappropriate and incorrect conversion factor when its primary inquiry mandated by the Legislature was to find actual value of the property to be assessed, was a resort to fictions. A fiction is not allowed to obscure the facts when the facts become important. The important facts which the fictions tended to obscure in 1958 and 1959 were that in 1956 and 1957 appellee took 95 percent of the actual value of the Nebraska property of appellant for basic value rather than 70 percent, which the law required, and based the assessment of the property thereon. Appellee then applied to the incorrect amounts found for those years a conversion factor in 1958 of 1.429 and in 1959 of 1.4286 which was in any event only permissible when the basic value of the property was fixed at 70 percent of actual value and thereby appellee added in 1959 more than $5 million to the actual value of the property of appellant in this state.

Appellee assigned 6.7025 percent of the total value of the railroad property in 1959 to the Nebraska property of appellant which was $15,047,539. That is the actual value of the property in 1959 concerned in this litigation and the duty of appellee was to assess it at 35 percent. Appellee destroyed any trace of reasonableness or realism by deducting 5 percent from that amount, multiplying the remainder by a conversion factor, and calling the result the actual value of the Nebraska property. The action of the appellee in inflating the value of the Nebraska property of appellant by the devices it used was arbitrary, unreasonable, and contrary to law.

The original assessment order of July 15, 1959, was adopted by only two members of the board voting for it. One member voted against it, one member ab-

stained from voting, and one member was absent. The use of the matter contained in section IV of the order of assessment was not a mistake, an inadvertence, or because of insufficient information. It was done advisedly and arbitrarily. The Tax Commissioner of the state advised against the use of it. He presented a proposed order of assessment wholly eliminating that formula. He advised that the facts and the law required a reduction in railroad valuations for assessment purposes. One of the members who voted for the assessment order said in a voluntary, formal statement he would never be a party to extending the type of relief suggested to any special interest at the unavoidable tax expense of Nebraska farmers, main street merchants, and homeowners. However, the same statement tacitly conceded that railroad property had been overassessed and this was illustrated by a reference to 1955 when, as asserted in the statement, the "valuation should have declined because of the change in base, it actually increased 5 million dollars." The other member who supported the 1959 assessment order said he opposed any concessions to any special interest group when the average taxpayer would have to make up the difference from his own pocket. Neither of these members mentioned anything specific concerning the value of the property to be assessed nor did they undertake to show where the judgment of the Tax Commissioner was wrong. The Tax Commissioner stated that appellee had no right to consider such an effect among taxpayers and that its only right and duty were to make an assessment of railroads at the same level as all other assessments. He appropriately said if appellee was to refuse to reduce values because other taxpayers will make up the difference, then no taxpayer, whatever his status or station, could ever get relief from unjust taxation. The observations in Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146, are appropriate: "The case is not one of mere

errors in judgment in following a proper method, * * * but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity."

The method employed by appellee in assessing the property of appellant in Nebraska as exhibited by section IV of its assessment order of 1959 resulted in the assessment of the property at not less than 47½ percent of its actual value as found by appellee and described in its order as allocation of computed value. The facts of the assessment may be correctly and simply stated as follows:

Actual value	$15,047,539
Assessment	47.5009%
	$ 7,147,723
Less local assessment	82,000
	$ 7,065,723

All tangible property has since September 20, 1957, been required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The evidence establishes that all tangible property except railroad property was assessed at not more than 35 percent of its actual value. The Constitution provides that taxes shall be levied by valuation uniformly and proportionately upon all tangible property, subject to exceptions not important to this case. Art. VIII, § 1, Constitution of Nebraska.

Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment, *ante* p. 77, 101 N. W. 2d 856, is decisive of the conclusion that the 1959 assessment of the Nebraska property of appellant by use of the formula in section IV of the assessment order is arbitrary, discriminatory, and contrary to law. Therein it is said: "It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess

it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property. * * * A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes. * * * It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value. * * * Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay."

The difference between not less than 47½ percent and 35 percent when applied to the large valuation involved in this case is not substantial or appropriate uniformity as contended by appellee and as required by the Constitution and the applicable statute of the state. Appellee applied the factor of 1.4286 to 95 percent of the actual value of the railroad property and to 70 percent of the actual value of other tangible property. The fact that a uniform percentage was used is not important. The discrimination between railroad property and other tangible property and the overvaluation of the former resulted from the deliberate act of appellee refusing to apply the conversion factor to the same basic valuation. As a result of such discrimination in the use of the conversion factor alone, apart from any other formula error, the property of appellant was assessed at not less than 47½ percent of its actual value and other tan-

gible property was assessed at not more than 35 percent of its actual value. The circumstances of this case as discussed in the foregoing characterize the assessment of the Nebraska property of appellant for 1959 as arbitrary, unreasonable, and discriminatory.

Appellant assigns error in the assessment because appellee used investment in transportation property as one factor in determining the value of the property of appellant in Nebraska in that it represents the original cost as decided by the Interstate Commerce Commission as of June 30, 1917, without any allowance for depreciation on about 40 percent of such investment at December 31, 1958, which is subject to wear and tear and it does not reflect the obsolescence inherent in the entire account due to the sharp decline in traffic carried and revenue earned by appellant.

The argument of appellant emphasizes in support of the assignment substantially the following matters: The record establishes a gross overvaluation of the property of appellant because appellee gave full weight to historical or investment cost without proper allowance for obsolescence and in the face of an extreme disparity between cost figures and commercial values as shown by the market value of its securities and its capitalized earnings. The three factors from which the system value of the railroad was determined were a 5-year average value of stocks and bonds, the capitalization at 6 percent of the average of net earnings during a 5-year period, and the investment in transportation property. The cost figure used by appellee was $485,766,102 which is three times that of the 5-year average of the stocks and bonds value of $159,279,000 and more than sixteen times greater than the 5-year average of net operating income capitalized at 6 percent amounting only to $28,474,083. The relationship of the cost factor to securities value and capitalized income is not as disproportionate to railroads generally as it is to appellant because of its greater degree of obsolescence experienced

by it. The use of the cost factor, without substantial debasement thereof for obsolescence, inherently discriminates in favor of railroads with a lesser degree of obsolescence and against railroads with a greater degree of obsolescence, of which appellant is a prime example. The traffic density for the year 1958 of appellant was less than 500,000 net revenue tons per mile of line, and this indicates a complete obsolescence of railroad properties according to the evidence. The evidence of the net return on investment for six standard railroads and appellant showed a return of less than 1 percent for appellant and an average of 6½ percent for the other six. The return on the investment of appellant was 81 percent below that of the other railroads. This indicates that it would be improper to use any cost figures in an inquiry concerning the value of the property of appellant without a debasement up to 80 percent of such figure. There was evidence, not contradicted, of the use of the property of appellant compared to six other standard railroads. Using five factors, it was disclosed that appellant was about 60 percent under that of all the other railroads. This would require at least a substantial debasement in arriving at the fair market value of the property. There is evidence that if cost is to be accorded any consideration in deciding market value, there should be a minimum of 60 percent for obsolescence. There is evidence, not disputed, that the use of investment cost to determine market value of the property of appellant was arbitrary and it should be given little if any weight without making a full and realistic allowance for obsolescence as established by the proof. It was shown that there was no net operating income from the property of appellant in Nebraska for 1958 but there was a loss of $1,377,629. This evidence of the condition of appellant so far as the Nebraska property is concerned clearly convinces, appellant asserts, that a different measuring rule or method must be used for appellant if market value of its operating

property in this state is to be established as the law requires. The cost of transportation property is relatively undesirable evidence of value for many railroads. Value looks to the future, being the present worth of future income expectations; while cost is based entirely on experience. Past investment has relevance in the determination of present worth only to the extent that it provides a clue to earning prospects. If the cost factor is not debased to reflect the degree of obsolescence, it being the impairment of the earning power of property, no clue is provided by such cost factor as to earning prospects.

A railroad operating in this state is required to make a comprehensive and detailed schedule of all its property each year on or before April 1 to appellee in conformity to the instructions and forms prescribed by it. The schedule must show the kind, extent, and value of the property of the railroad; its earnings and net income; the value of its stocks and bonds; the amount of its secured and unsecured indebtedness, except expenses of operations; the description and value of its physical property, real and otherwise; and other elaborate information relative to its property, operations, and condition. § 77-603, R. R. S. 1943. Appellee is required to consider the values given in the schedule in arriving at the true value of railroad property and its franchises. The schedule is not conclusive of the value of the property. Appellee from all information it can obtain must find the true value of the property and assess it on the same basis as all other property is required to be assessed. § 77-604, R. R. S. 1943. Appellee, commencing with the year 1953, found the system value of each railroad by consideration of the 5-year average value of stocks and bonds, a 5-year average of net operating income capitalized at 6 percent, and the investment account of the railroad showing the amount invested in transportation property as depreciated according to Interstate Commerce Commission regulations and addi-

tional deductions of 10 percent, 5 percent, and 5 percent.

The use of the investment account of appellant in the 1959 assessment is the basis of this challenge. It is quite immaterial in the consideration of this contention of appellant whether reference to the investment account is made as historical cost less depreciation or as reproduction cost less depreciation. The statute states that actual value of property for taxation shall mean the value that is ascertained by using, as far as applicable, a designated formula including "reproduction cost less depreciation." § 77-112, R. R. S. 1943. The reproduction cost less depreciation as the statute states or historical cost less depreciation as it is sometimes expressed has frequently been considered and approved by the courts as a permissible factor in conjunction with other factors in determining the actual value of the property of a railroad company.

State ex rel. Bee Building Co. v. Savage, *supra,* states: "As to just what will determine the value of the entire railroad property, a part of which is to be assessed in any one state or taxing jurisdiction, the courts themselves are not in entire accord. There are, doubtless, many elements and factors which conduce to a correct determination of the true value, and may properly be considered, which have received the approval of the courts generally. * * * Whether it be for the purpose of fixing reasonable rates for the transportation of passengers and carrying of freight, or for the purpose of taxation, the rule to be applied in ascertaining the value of the property should be the same. * * * In the case of Smyth v. Ames, 169 U. S., 466, 546, * * * Mr. Justice Harlan, who wrote the opinion of the court, says with reference to the reasonableness of rates to be charged * * *, that the basis of all calculations 'must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market

value of its bonds and stocks, the present as compared with the original cost of construction, the probable earning capacity of the property * * *, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property.' "

It is said in Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, *supra:* "There are various standard methods of valuation of railroads for taxation purposes. For examples: The ad valorem method, by which the property is appraised the same as other property in the state; the capitalized income method, under which the net income is ascertained and the amount thus derived is capitalized at some fair rate of return; and the stock and bonds method, by which the value of the stocks, bonds and other outstanding indebtedness is considered with other property values with a view of arriving at a market value. These are not all the methods, but they suffice to show at a glance some of the more customary methods of valuation."

In Chicago & N. W. Ry. Co. v. Department of Revenue, 6 Ill. 2d 278, 128 N. E. 2d 722, the court said: "Throughout its brief plaintiff refers to capitalized earnings and market value of securities as the 'statutory standards,' and appears to argue that the statute does not permit consideration of reproduction cost in determining the assessed value of railway properties. * * * The physical value of property, shown either by reproduction cost or historical cost, has been held to be an important factor in fixing values for taxation purposes. * * * In our opinion the authorities do not warrant ignoring the physical value of railroad property in determining its assessed value under ordinary circumstances, nor do they indicate that an undue weight was given to that factor in this case. The two factors pressed upon us by plaintiff are not without deficiencies as yardsticks of

value. In the case of ordinary property, the income which a particular owner is able to realize from it is not considered relevant in determining value. * * * It is admissible here not because of its intrinsic reliability, but by necessity. Nor is it realistic to regard as conclusive the values which the securities market indicates. Many factors, unrelated to the values of particular property, may play a part in determining the price of securities."

St. Louis-S. F. Ry. Co. v. Arkansas Public Service Commission, 227 Ark. 1066, 304 S. W. 2d 297, contains the following: "Is this method—of cost value, capitalized earnings value, and stock and debt value—a fair 'yardstick' to determine the system value of Frisco's property? Frisco claims that the cost value is overweighted and that it should be given little, if any consideration * * *. We hold that the 'yardstick' used by the Commission in determining the system value of Frisco in this case is fair and not arbitrary. It is undenied that such a 'yardstick' has been used by the Commission heretofore, and that such a 'yardstick' is used in other states. One such case is that of Chicago & Northwestern Ry. Co. v. Department of Revenues, 6 Ill. 2d 278, 128 N. E. 2d 722 * * *. This is not the only 'yardstick' that could be used, but it is fair and equitable."

Kansas City So. Ry. Co. v. Arkansas Commerce Commission, —— Ark. ——, 323 S. W. 2d 193, states: "The Railroad contends that 25% should be deducted from the RCN-D value because of functional and economic obsolescence. * * * Undoubtedly functional and economic obsolescence is reflected in both the stock-plus-funded-debt method and the capitalized earnings method of valuation. In both of these methods the Railroad received the benefit of both functional and economic obsolescence. * * * And in Bailey v. Megan, 8 Cir., 102 F. 2d 651, 655, it is said: 'A computation of system value based upon average market price of stocks and bonds

and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings.' "

People ex rel. McDonough v. Grand Trunk Western R. R. Co., 357 Ill. 493, 192 N. E. 645, declares: "The factors of reproduction costs and historical cost, or original cost plus the cost of betterments, are important factors to be considered, although not necessarily controlling, in determining the fair cash market value of railroad property."

In Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696, the court said: "The members of the Board were justified, and it was their duty, to take into consideration all facts which go to make up the actual value of the railroad property in this state. The stock and bond method and the capitalization of earnings and a composite of these methods based upon a period of time likely to reflect the market value of the property, were doubtless proper matters to be considered by the Board; but the Board was not restricted to these. The value of the physical elements, the cost of construction and of replacement, the present and prospective earning capacity at rates that are reasonable * * * were also matters that the State Board of Equalization properly might consider, giving such weight to the different facts as in their judgment, fairly and honestly exercised, they deemed them to be entitled to receive."

In Fargo v. Hart, 193 U. S. 490, 24 S. Ct. 498, 48 L. Ed. 761, it is said: "On the other hand, it (the state) can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State in taxing, even though the other parts of the system are outside of the State. The sleepers and rails of a railroad * * * are worth more

than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system."

In Harris Trust & Savings Bank v. Earl, 26 F. 2d 617, it was contended that valuation of railroad property for taxation should be determined, if not altogether at least most largely, from a consideration of the earning capacity of the property. The court said: "But it is not the law that the valuation of railroad or other property for taxation purposes is to be determined from any single factor. As bearing upon the proper result, many facts have evidential value. Certainly, among others, are to be considered original cost, cost of reproduction less depreciation, bonded indebtedness, current market value of stock and bonds, and earning capacity. Of these the two last named are of the greatest significance. * * * Even if it be conceded that a close and scientific inquiry demonstrates that during a period of two years (1924 and 1925) earnings disappeared entirely * * * that fact by itself does not make the valuations fixed unquestionably and beyond all bounds excessive * * *."

City of Jersey City v. State Department of Taxation, 136 N. J. L. 353, 56 A. 2d 479, asserts: "Furthermore, the failure to operate at a profit is not in and of itself conclusive evidence that the assessment of its property is unreasonable, nor does it operate to relieve the railroad from paying its proportion of the public tax burden."

Appellant refers to the statements in Chicago & N. W. Ry. Co. v. Eveland, 13 F. 2d 442, that: "* * * the

net earnings of the property and the market value of its stocks and bonds for a reasonable period antecedent to the making of the assessment constitute the most reliable and influential evidence of that value," and "In determining the value of the property of a railway company * * * the value of the use of such property * * * and its net revenue from such use, and * * *the current market value of its stocks and bonds are among the most persuasive and authoritative—far more so than the cost of the property or the cost of its reproduction new in cases in which the property is in operation and has been for many years" in support of its contention that the historical cost as depreciated was given too much weight in the assessment and its conclusion that the court in that case rejected the doctrine that costs should be taken into consideration in deciding the value of railroad property. The court which decided that case said concerning it in the later case of Harris Trust & Savings Bank v. Earl, *supra:* "The case cited (13 F. 2d 442) by no means holds that earning capacity is completely to overshadow other factors. Indeed, in that very case other factors were given such consideration as that a $29,000,000 valuation was inferentially held fair on railroad property producing substantially no net earnings whatsoever."

Bailey v. Megan, 102 F. 2d 651, is urged as an authority for rejecting a valuation based on costs. That litigation concerned the valuation of the property of appellant in the State of South Dakota for the year 1935 and considered a special and unfortunate situation of such gravity that the railway company was involved in a bankruptcy proceeding. The case was brought and prosecuted by the trustee for the property of the railway company. However, the court, notwithstanding the unfavorable condition of the railway company, its property, and its earnings, sustained an assessment of the property in South Dakota to the extent of 65 percent of it in an amount in excess of $15 million. The method

used by the taxing authorities in deciding the 1935 value of the property was not disclosed. The court in that case made this significant statement: "A computation of system value based upon average market price of stocks and bonds and a computation based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings * * *."

Appellant includes in its argument a quote from the opinion in State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663, to the effect: "* * * that, when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have * * * ascertained the true value of the road, all its property, its capital stock, and its franchises * * *." That case concerned the valuation of three railroad properties in Illinois. The court recited that the capital stock of one of the carriers was sunk, was of no value, and that its funded debt had no present market value. It was argued that the meager earnings and low market value of the securities of the railroad company were conclusive as to the valuation of the property. The opinion in that case contains the quotation from it by appellant but immediately following that language appears this important statement: "This would of itself be, perhaps, the fairest basis of taxation for the State at large, if all railroads were solvent and paid the interest promptly on their funded debt. * * * If taxes were assessable alone on the value of the capital stock and franchises of the corporation, cases might be found where these were worth nothing, and such companies would pay no tax even for their real estate and personal property. And this is precisely the main argument of counsel for the Toledo, Peoria, and Warsaw Railroad Company, in opposition to the law and to the rule of the board of equalization. But individuals do not escape taxation on their real and personal property

because they are insolvent. * * * No State has ventured to establish the principle of permitting its visible, tangible property to escape taxation, relying solely on a tax imposed on the individual on the basis of his estimated wealth in excess of his debts."

This case does not present a situation in which depreciated historical cost was considered by itself as a measure or element of true value of railroad property. Average value for a 5-year period of securities of appellant, capitalized average net income for a like period, and depreciated historical cost were considered together in reaching a conclusion as to system value. All railroads operating in the state were subjected to the identical items and method. The use of a cost factor in conjunction with appropriate additonal factors in ascertaining value of railroad property for taxation purposes has been generally sustained by the courts. The authorities are substantially in agreement that it is not ordinarily unreasonable, arbitrary, or contrary to law for an assessing authority to use and consider depreciated historical cost in connection with other recognized and approved factors in determining the value of railroad property. The assignment of appellant in this respect cannot be sustained.

Appellant assails the 1959 assessment of its Nebraska property because appellee in finding the value to be taxed in Nebraska used as one of the allocation factors current track mileage, meaning the proportion of the mileage in Nebraska to the entire mileage of the system. The basis of the objection is that the proof establishes that the part of the railroad in Nebraska is inferior to and much less valuable than the parts of it in other states; that an apportionment of values on a mileage basis is because thereof arbitrary and unreasonable; and that it results in bringing into this state a value located in other states. The mileage factor was not the only one employed in the 1959 allocation. The proportion of the system value assigned to this state was the percent-

ages that the Nebraska traffic units, 4.87 percent; gross earnings, 5.28 percent; car and engine mileage, 6.23 percent; and current track mileage, 10.43 percent, bore to the system total. These, except the last, would reflect obsolescence affecting appellant.

Rowley v. Chicago & N. W. Ry Co., *supra,* considered an issue concerning the amount of system value of an interstate railway that should be assigned to the State of Wyoming. The assessing authority had utilized four factors in making the allocation in question. The court said in sustaining the value assigned to the State of Wyoming the following: "Where, as in this case, the evidence requires a finding that the railroad in one of the States reached by the system is clearly shown to be worth much less than the average value per mile of the system, an apportionment on mileage necessarily assigns an excessive amount to that State, and the use of that basis as the sole measure for apportionment must be condemned as arbitrary. * * * In arriving at the relation between value in Wyoming and system value, the State board did not confine its calculations to relative mileage. That percentage combined with the other ratios used in the calculation produced 2.1% finally adopted. * * * We find no substantial support in the findings of the district court or in the evidence for the conclusion that the use that the state board made of relative mileage to ascertain the value of respondent's Wyoming railroad property was arbitrary or unreasonable * * *."

In Pleasant v. Missouri-K.-T. R. R. Co., 66 F. 2d 842, the court said: "That state Tax Commission, in determining percentage of value of interstate railroad system allocable to intrastate property, considered, besides main track mileage, factors reflecting use and usefulness of railroad property within state, held not to render commission's method fundamentally erroneous." In the opinion it is said: "In making this allocation the evidence is that the Commission viewed the property

in Kansas, and considered the main track mileage, the all-track mileage, the gross earnings, car and locomotive mileage, and traffic units, of Kansas as compared with the system * * *. In the Norfolk and Western R. Co. case, *supra* (3 F. Supp. 791), the Commission used the same factors used by the Commission here, and that court held that 'We do not see how a fairer method could have been used.' * * * In Louisville & Nashville R. Co. v. Greene, 244 U. S. 522, 543, 37 S. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97, it was held that a statute requiring the Tax Commission to consider track mileage in allocation did not prohibit it from also considering gross revenues. Without attempting to exhaust the authorities, it seems clear to us that a railroad carrying a large volume of traffic is of more value than one with little traffic; that such useful value should be considered; that in order to consider it, resort must be had to those facts which reflect use—gross earnings, traffic units, or train miles—or some of them."

In Cleveland, C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 439, 14 S. Ct. 1122, 38 L. Ed. 1041, the court said: "If an assessing board, seeking to assess for purposes of taxation a part of a railroad within a State, the other part of which is in an adjoining State, ascertains the value of the whole line as a single property and then determines the value of that within the State, upon the mileage basis, that is not a valuation of property outside of the State; and the assessing board, in order to keep within the limits of state jurisdiction, need not treat the part of the road within the State as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road."

Bailey v. Megan, *supra,* states: "It is very apparent from the cases of Rowley v. Chicago & Northwestern Railway Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222, and Great Northern Railway Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, that there can be no

definite rule established by the courts for the ascertainment of the maximum allocation factor which may be used by state authorities in apportioning the value of a railroad system."

It is contended by appellant that in deciding system value by the use of factors, one of which was the capitalization of net income, appellee should have used a rate of at least 8 percent. This is not supported by judicial determination.

In Chicago, R. I. & P. Ry. Co. v. State, *supra,* this court said: "Again, the net railway operating income for 1922 is in evidence. The value of the property may in one sense be considered to be the amount of capital investment which will produce that amount of income at the rate of 5¾ per cent. per annum, which is considered by the interstate commerce commission to be a fair rate of return on such an investment, or at 6 per cent. which we consider to be a fair rate."

St. Louis-S. F. Ry. Co. v. Arkansas Public Service Commission, *supra,* declares: "The use of 6% by which to capitalize earnings value of railroad held neither arbitrary nor confiscatory."

In the recent case of Kansas City So. Ry. Co. v. Arkansas Commerce Commission, *supra,* the court said: "Appellant next argues that 5.75% should not be used as a capitalization rate. In the Frisco case, a 6% capitalization rate was approved, and this was before taxes. Here, the 5.75% rate is after taxes. If 6% before taxes was reasonable in the Frisco case, certainly it cannot be said that in the case at bar 5.75% after taxes is not justified."

Pleasant v. Missouri-K.-T. R. R. Co., *supra,* says on this subject: "The Commission capitalized the net revenues furnished to it by the company on a 6 per cent. basis. The master used 7 per cent. Both percentages are in the zone of reason * * *. Six per cent. is the rate of interest on judgments in Kansas; it is considered a good return on non-speculative investments * * *."

See, also, Chicago & N. W. Ry. Co. v. Department of Revenue, *supra;* Louisville & Nashville R. R. Co. v. Greene, 244 U. S. 522, 37 S. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E 97.

The findings of appellee in sections I, II, and III of its assessment order of July 15, 1959, concerning the property of appellant are correct and are adopted by this court.

The assessment of the 1959 property of appellant in Nebraska as contained in section IV of the assessment order of appellee of July 15, 1959, should be and it is hereby reversed.

It should be and is adjudged that the actual value of the property of appellant for 1959 in Nebraska is the sum of $15,047,539; that from 35 percent thereof or $5,266,638 there should be deducted the value of the locally assessed property of appellant the sum of $82,000; and that the 1959 assessment of the property of appellant in Nebraska should be and is $5,184,638.

ORDER REVERSED. JUDGMENT OF ASSESSMENT RENDERED.

IN RE ASSESSMENT AND VALUATION OF UNION PACIFIC RAILROAD COMPANY.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

101 N. W. 2d 892

Filed March 18, 1960. No. 34715.

1. **Taxation: Appeal and Error.** An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to this court.
2. **Taxation: Railroads.** The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment

and it may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained.

3. **Taxation: Trial.** Generally, there is a presumption that when an assessing authority values property for taxation purposes it acts fairly and according to law upon sufficient evidence to sustain its conclusion but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be decided from evidence, unaided by presumption, and the burden of establishing an illegal assessment is upon the complaining party.
4. **Taxation: Railroads.** It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property.
5. **Taxation.** A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes.
6. **Taxation: Railroads.** It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value.
7. **Taxation: Constitutional Law.** Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay.

APPEAL from the State Board of Equalization and Assessment. *Order reversed. Judgment of assessment rendered.*

F. J. Melia, James H. Anderson, and *George C. Holdrege,* for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

This controversy concerns the assessment of the property of appellant in Nebraska by appellee for the purpose of all ad valorem taxes, except municipal taxes, for the year 1959. Appellant made a return or schedule of its property as of March 31, 1959, to appellee in all respects as required by the statute. § 77-603, R. R. S. 1943. Appellant appeared at a hearing before appellee on May 4, 1959, and evidence was produced relative to the value of its property. Appellee on July 15, 1959, found and determined that the actual value of the property of appellant in Nebraska subject to assessment for taxation purposes by appellee was $210,597,729 and it assessed the property, after deducting locally assessed property, at the sum of $70,015,144.

The complaint of appellant concerning the assessment made by appellee, in substance, alleged, in the respects necessary to be noted here, the following: The assessment was discriminatory, unreasonable, and unlawful. It was not based upon a valuation and assessment of 35 percent of actual value as provided by law but the assessment was not less than 47½ percent while all other tangible property subject to taxation in Nebraska, except railroad property, was assessed and taxed for 1959 at not to exceed 35 percent of its actual value. The basic value statute was amended in 1957 to provide that all tangible and real property in Nebraska should be valued at its actual value and should be assessed at 35 percent of such actual value. It was not available for taxation until 1958. In that year appellee resorted to the device of using a multiplying or conversion factor of 1.42, the use of which was erroneous and resulted in an assessment of appellant's property in the amount of not less than 47 percent of actual value. In 1959 appellee by use of such conversion factor assessed

the property of appellant in Nebraska at not less than 47½ percent of actual value; and because all other property than railroad property subject to assessment by appellee in 1959 was taxed at not to exceed 35 percent of actual value, the action of appellee in assessing the property of appellant resulted in an unjust, unlawful, and discriminatory taxation in violation of Article VIII, section 1, of the Constitution of Nebraska; it was a violation of the statute of Nebraska requiring all tangible and real property to be valued at 100 percent of its actual value and assessed at 35 percent of such value; and it violated the statute which provides that railroad property shall be assessed on the same basis as all other property. The actual value of the property of appellant in Nebraska within the jurisdiction of appellee for assessment in the year 1959 was not in excess of $155,174,172 which at 35 percent thereof, after deducting locally assessed property found by appellee to be properly deductible, would have produced a lawfully assessed value of not to exceed $50,616,899. The prayer of the complaint was that the assessment made by appellee in the amount of $70,015,144 be set aside and that appellee find and determine the assessed value of the property of appellant in Nebraska to be the sum of $50,616,899.

A hearing was held by appellee on July 28, 1959, at which time additional evidence was introduced on behalf of appellant. Its complaint was that day denied and the original assessment of the property of appellant was affirmed by appellee. This appeal is a challenge of the legality of the recited actions of appellee.

The authority of this court in a proceeding of this character is by legislative mandate to hear and determine the matter in controversy de novo upon the record. § 77-617, R. R. S. 1943.

Appellee is charged with the obligation of assessing property of railroads and railroad corporations in the state except designated items outside of right-of-way

and depot grounds. § 77-601, R. R. S. 1943. The Legislature has not defined any method by which railroad property in the state shall be valued for taxation by appellee. The Legislature has directed that specified things shall be considered but it has not prescribed any definitive formula for ascertaining value. That is committed to the judgment and discretion of appellee to be exercised fairly within legal limitations and restrictions. Appellee may resort to any method by which a substantially just and correct determination of the value of such property can be reached if it includes consideration of the things which the statute requires.

This court in Chicago, R. I. & P. Ry. Co. v. State, 111 Neb. 362, 197 N. W. 114, remarked: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. * * *" The opinion in that case states: "The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property."

In Great Northern Ry. Co. v. Weeks, 297 U. S. 135, 56 S. Ct. 426, 80 L. Ed. 532, it is said: "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have." See, also, State ex rel. Bee Building Co. v. Savage, 65 Neb. 714, 91 N. W. 716; Chicago, St. P., M. & O. Ry. Co. v. State Board of Equalization, 133 Neb. 640, 276 N. W. 391; Rowley v. Chicago & N. W. Ry. Co., 293 U. S. 102, 55 S. Ct. 55, 79 L. Ed. 222; Northern P. Ry. Co. v. State, 71 N. D. 93, 299 N. W. 696.

Appellant does not in this case contest the method adopted by appellee for ascertaining the 1959 value of the total operating property of appellant, that is $706,-

621,911 or the value of the part thereof in this state which is $155,174,171 as shown by sections I, II, and III of the assessment order of appellee. Appellant does contest the validity and legality of the increase of the last amount stated above to $210,597,729 by the method and process recited in section IV of the 1959 assessment order of appellee.

Appellee determined the actual value, referred to by it as system value, of the railroad property of appellant by a consideration of three factors: 5-year, 1954-1958, average value of the stocks and bonds; 5-year, 1954-1958, average of net operating income capitalized at 6 percent; and investment in transportation property less recorded depreciation. Each factor was given equal weight and this resulted in an average value of the railroad property of appellant of $706,621,911. This was the actual value of the railroad of appellant as determined by appellee. Appellee then decided the proportion or share of this value that should be allocated to Nebraska because of the part of the property of appellant therein. This was determined by a consideration of four factors referred to by appellee as allocation factors: Traffic units, gross earnings, car and locomotive miles, and current track mileage in Nebraska compared with the same factors in other states where the property of appellant is located. The component average of the four factors was 21.96 percent. This, applied to the actual value of the railroad as found by appellee of $706,621,911, produced $155,174,171. This was the actual value of the Nebraska property of appellant in 1959 subject to taxation as determined by appellee but it did not take 35 percent thereof. Instead it reduced that amount by 5 percent or to $147,415,462 and multiplied that figure by 1.4286 thereby increasing the amount to $210,597,729 and labeled it actual value. Appellee then took 35 percent of that amount or $73,709,205, deducted the amount of the locally assessed property as found by appellee of $3,694,061, which re-

sulted in $70,015,144, and that was made by appellee the 1959 assessment of the property of appellant in Nebraska.

The assessment described above from which this appeal was taken is exhibited by the following:

I SYSTEM VALUE

a. 5-year average value stocks and bonds

1954	$ 603,355,083	
1955	672,344,689	
1956	608,351,744	
1957	410,040,320	
1958	467,935,345	
	5)2,762,027,181	Average $552,405,436

b. 5-year average net operating income capitalized at 6 percent

1954	29,561,550	
1955	43,739,492	
1956	42,137,162	
1957	38,818,024	
1958	43,461,084	
	5)197,717,312	
	.06) 39,543,462	659,057,700

c. Investment in transportation property ICC Report page 200, line 16, less 5%, less 5%, less 5% 908,402,598

Average System Value $706,621,911

II ALLOCATION FACTORS

Traffic units	24.05%
Gross earnings	23.54%
Car and locomotive miles	25.23%
Current track mileage	15.02%
Average	21.96%

III ALLOCATION TO NEBRASKA
$706,621,911 × 21.96% = $155,174,171
IV ASSESSMENT
In 1957 and 1958 the allocated computed value less 5% = Basic Value or 70% of actual value. Therefore the allocated computed value in 1959 less 5% = 70% of actual value
$155,174,171 less 5% = $147,415,462
$147,415,462 × 1.4286 = 210,597,729 Actual Value
35% Statutory %

	$ 73,709,205
Local assessment	3,694,061
State Board Assessment for 1959	$ 70,015,144

Appellant exhibited in the return or schedule of its property for 1959 furnished to appellee various bases for the valuation of the property of appellant on the unitary theory and various bases for allocation to Nebraska for its share of the total valuation. Likewise the basic figures forming the value of the entire property of appellant are shown by that return or schedule. The order of appellee in its procedure to value the property as shown by section I a, b, and c of the assessment order of July 15, 1959, adopted the highest figure set forth in the return or schedule of appellant for that year.

The issue on this appeal is: Does the undisputed evidence establish $155,174,171, designated in the assessment order of appellee as allocation to Nebraska, as the actual value in 1959 of the property of appellant in Nebraska and was the increase thereof by appellee to $210,597,729 arbitrary, discriminatory, and contrary to law?

The evidence in this case was introduced in the record on behalf of or by appellant. There was no evidence offered by or on behalf of appellee. There is a

presumption that when an assessing authority values property for taxation purposes it acts fairly and legally upon sufficient evidence to sustain its action but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be determined from evidence, unaided by presumption, and the burden of showing an improper assessment is upon the complaining party. Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N. W. 2d 730; Omaha Paxton Hotel Co. v. Board of Equalization, 167 Neb. 231, 92 N. W. 2d 537; Ahern v. Board of Equalization, 160 Neb. 709, 71 N. W. 2d 307.

There is undisputed evidence of the actual value of the entire operating property of appellant in 1959 as established by the market value of its stocks and bonds, its capitalized earning power, its investment in transportation property less depreciation, and by the testimony produced by appellant to that effect. It is not true, as appellee asserts, that there is no proof by appellant that the actual value of the property is different from that determined by appellee. There is no proof or legal justification to sustain the increase of the 1959 actual value of the Nebraska property of appellant from $155,174,171 to $210,597,729 as was done by appellee as shown by section IV entitled "Assessment" of the order of appellee of July 15, 1959. The resort to fiction of deducting 5 percent from the value of the Nebraska property and multiplying the remainder by the conversion factor of 1.4286 was induced by changes in the revenue statutes of the state. The 50 percent of full value law applied to all tangible property in 1953, 1954, and 1955. The 50 percent of basic value law governed assessment of tangible property in 1956 and 1957. The amendment requiring assessment of property of that kind to be valued at actual value and assessed at 35 percent thereof became effective September 20, 1957, and it applied to 1958 and 1959 assessments. § 77-201,

R. S. Supp., 1953; § 77-201, R. S. Supp., 1955; § 77-201, R. S. Supp., 1957.

In each of the years 1953, 1954, and 1955 appellee found the value of the entire operating property of appellant, hereafter referred to as property of appellant, by use of the identical three factors used for that purpose in 1959 and called it system value. It determined the value of the Nebraska property of appellant by allocating to it a percent of the system value by the same method it did in 1959; referred to the amount thereof as the allocated actual value, 100 percent, of the Nebraska property; and fixed the assessment for each of those years at 50 percent of that value. The record is definite that in each of those years appellee determined the actual value of the property of appellant by use of the same three factors or elements of value used by appellee in 1959 in arriving at what it labeled system value but which was the actual value of the property of appellant. This is true or appellee did not in any of those years find the actual value of the property as the statute required. There is no showing or explanation in the record of appellee why system value should mean actual value in those years but should not have that meaning in 1959.

Prior to the enactment of the 35 percent of actual value assessment law all tangible property was valued at its basic value and assessed at 50 percent thereof, and the ratio of basic value to actual value was by mandate of the Legislature fixed by appellee. It determined the basic value to be 70 percent of actual value and when the statutory assessment rate of 50 percent was applied, it resulted in a statutory level assessment of 35 percent if basic value had been properly determined in the first instance. The basic value law was amended effective September 20, 1957. The basic value element was eliminated and all tangible property not exempt from taxation was required to be valued at actual value and assessed at 35 percent thereof. §§ 77-112 and 77-201,

R. R. S. 1943. Thereafter 100 percent of actual value of property which had been assessed at 70 percent could be, if its value had not changed, readily ascertained by multiplying the assessment of the previous year by the resultant of 100 divided by 70 or 1.4286.

The value of the railroad system of appellant for 1956 was ascertained by appellee as it had been in the previous years discussed above by the average of the identical three factors and the value of the Nebraska property was determined by allocating the average of the four factors used in previous years or 22.04 percent. The value of the Nebraska property was thereby produced as $151,909,288 which appellee termed allocated value which was no greater or different than but was in fact actual value. Instead of taking 70 percent of that amount in accordance with the resolution of appellee fixing the ratio of basic value to actual value, appellee declared the basic value of the Nebraska property of appellant to be $144,313,823 which was exactly 95 percent of the allocated value.

Appellee by the same items and procedure determined in 1957 what it stated was the system value of the property of appellant and allocated 21.97 percent thereof or $155,989,437 as the value of the Nebraska property which was no greater or different than but was in fact the actual value of such property. Appellee then stated the basic value was $148,189,965. That was 95 percent, not 70 percent, of $155,989,437 as the law required to arrive at basic value. The insertion in section IV of the 1958 assessment order of appellee of the property of appellant: "(1957 Computed Value 5% = Basic Value)" is an admission of what is said above concerning the 1957 assessment. This is made certain by the immediately following item in the 1958 assessment order: "1958 Computed Value 5% = $142,854,317" which is precisely 5 percent less than the 1958 computed value of $150,372,966. The 1957 assessment of the Nebraska property of appellant was made on that errone-

ous basis. It is not important that appellee designated the $155,989,437 as allocated value because the factors used and the evidence definitely show it was actual value.

Appellee substantially concedes that basic value used in the 1956 and 1957 assessments was 95 percent of what was labeled by it as allocated value. It could not be otherwise because simple arithmetic demonstrates the factors employed in composing allocated value establishes that it was actual value of the Nebraska property of appellant in each of these years. A consideration of market value of stocks and bonds, the earning power of the railroad, and the investment account less depreciation evidences actual value. There was no attempt by appellee in either 1956 or 1957 to disclose by its assessment order or otherwise why it arbitrarily said basic value was 95 percent of what was obviously the actual value of the Nebraska property when basic value of all tangible property was established by the resolution of appellee at 70 percent of actual value. This omission was a disregard and violation of the statute which required that appellee in making an assessment of railroad property "shall set forth the manner in which it arrived at the assessment, the several items included in the total assessment and the manner of arriving at the several items and the total." § 77-609, R. R. S. 1943.

The value of the entire property of appellant in 1958 was determined by the average of the same factors as used in the previous years discussed above and 21.90 percent therof was assigned by the method used in previous years to the Nebraska property. That resulted in the sum of $150,372,966, designated by appellee as computed value for the Nebraska property. That was the same character of finding arrived at by the same method as had been previously considered and treated as actual value of that property. Appellee reduced that amount by 5 percent, multiplied the remainder by 1.429, and produced $204,138,818 which was described as 1958

actual value. The statutory percentage of 35 percent was applied and it resulted in an assessment of $71,448,-586. The day of this assessment appellee adopted a resolution which recited that the method of determining the actual value of tangible property for 1958 used by all county assessors is to convert basic value for 1957 to actual value by multiplying the basic value by 1.429. Ironically, appellee also recited in the resolution that it was "convinced that railroad property should be valued at 35% of actual value as is all other tangible property." Its expressed and recorded conviction was not enough to control its action because that identical day, as shown by the same resolution, appellee valued the property of appellant in Nebraska at very much more than 35 percent of actual value resulting from the fact that the property had not been valued at 70 percent of actual value in 1957 but at 95 percent of actual value and notwithstanding this important fact the conversion factor of 1.429 was applied to the value of the Nebraska property of appellant in 1958 as found by appellee to arrive at what it called actual value. The conversion factor of 1.429 had no relation to the situation presented by the 1958 assessment. Its use was arbitrary and it produced an equally arbitrary result.

The 1959 assessment of appellant was made by the same method as the 1958 assessment was accomplished. The identical factors were employed for finding system value and the same items were used to ascertain the percentage of the system value that should be assigned to Nebraska, which was 21.96 percent. It produced $155,174,171 and appellee reduced that amount by 5 percent and multiplied the remainder by 1.4286, 100 divided by 70 carried to the fourth decimal instead of 1.429 used by it in 1958. The result was $210,597,729 which appellee designated actual value. The statutory rate of 35 percent was applied to the last amount stated above and that produced, after deducting locally as-

sessed property, an assessment of the Nebraska property of appellant of $70,015,144.

The authority and obligation of appellee were to assess the property of appellant on the same basis as other tangible property was required to be assessed. §§ 77-601 and 77-604, R. R. S. 1943. All tangible property was required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The Legislature has defined actual value as used in the revenue statute. § 77-112, R. R. S. 1943. Appellee by its assessment order substantially followed the statute until it found and stated the amount of the system value that was represented by the Nebraska property of appellant which was $155,174,171. Section I a of the assessment order found the system value as evidenced by the selling price of the stocks and bonds of appellant, which responds to item (6) of the statute, "market value in the ordinary course of trade." Section I b found system value as evidenced by capitalizing the net operating railroad income, which is item (1), "earning capacity of the property." Section I c found system value as shown by investment account less deduction for physical and economic obsolescence, which appellee concedes is equivalent to item (4), "reproduction cost less depreciation." The remaining three items of the statute: "(2) relative location; (3) desirability and functional use"; and "(5) comparison with other properties of known or recognized value," may be considered as included in market value and earning capacity to the extent there applicable.

The hypothesis and result of each part of section IV of the assessment order of 1959 made by appellee are incorrect factually and are contrary to law. The 1957 or 1958 allocated value less 5 percent did not equal basic value or 70 percent of actual value as that formula assumed and stated. In making the 1957 assessment instead of appellee taking 70 percent of allocated value as basic value, it treated 95 percent of allocated value

as basic value. That error resulted in overassessment, was repeated, and was given effect by appellee to the prejudice of appellant as hereinbefore noted in the assessment of 1958. The error of the first sentence inheres in each of the following parts of the formula.

There was no necessity of fact or justification of law for the resort by appellee to a reduction of 5 percent of the amount of the valuation assigned by it in 1959 to Nebraska or for the use by it of the conversion factor in ascertaining the actual value of the property of appellant in Nebraska. The use of these was arbitrary and in violation of the statute defining actual value. The use of them disregarded the undisputed evidence that the actual value of the Nebraska property of appellant did not exceed $155,174,171, the amount of the allocation by appellee to Nebraska. Appellee found that the system value of appellant was $706,621,911. Included in this amount was every possible value of the railroad of appellant including its franchise or its right to exist. Appellee made no attempt to demonstrate that there was any omission of anything of value from the schedule of property of appellant furnished appellee in 1959. It was accepted, acted upon without objection, and everything therein was valued and included in what appellee termed system value in its assessment order. Appellee belatedly now says in this court that the statute requires it to assess railroad property "together with franchises"; that the record does not show that it made a separate valuation of franchises; and that it may be presumed it considered the element of franchise rights in arriving at actual value. This may be accepted if appellee means by actual value $155,174,171, the value assigned to Nebraska. Otherwise it is incorrect because franchise value was included in the assessment by use of the factors used by appellee to reach what it termed system value. The following from State ex rel. Bee Building Co. v. Savage, *supra,* fully explains the matter of franchise value in making such

an assessment: "Where the property of a railroad corporation is assessed by the state board of equalization as a unit, and in fixing the value thereof the board takes into consideration the fact that the property is being used for effectuating the objects of the corporation, is earning an income in the transportation of passengers and carrying of freight for hire, and that such corporation is exercising the rights, powers and privileges of corporations organized for the purpose of engaging in business as common carriers, such assessment, so made, would include and cover the intangible as well as the tangible property of the corporation, and would be an assessment of its franchise."

The system value fixed by appellee of $706,621,911 is and must be accepted as the 1959 actual value of the entire railroad property of appellant. Any contention otherwise is only a play on words without evidentiary integrity or legal justification. The practice by appellee of reducing the value assigned to appellant in Nebraska by 5 percent originated in 1957. It is not set out or expressed in the assessment order of that year except as it results from the finding that the Nebraska property had a certain value for that year and that the basic value thereof was exactly 5 percent less than the total value assigned to Nebraska. This practice reoccurred in 1958 and 1959. The deduction of 5 percent of the value assigned to Nebraska in each of those years was arbitrary and without reason therefor given in the respective orders of assessment of appellee for those years. The reason suggested in this litigation by appellee that the allocated value was 5 percent more than basic value is not convincing. Appellee had fixed basic value at 70 percent of actual value of all tangible property for taxation purposes. The allocated value assigned to the Nebraska property was a finding of actual value of the property by all the applicable evidence in the record. If it was not, the appellee did not in any of these years find what the actual value of the property was in

which event it had no basis for finding the basic value of it. The indulgence of appellee making an unexplained 5 percent deduction from the value of the property to be assessed and resorting to an inappropriate and incorrect conversion factor when its primary inquiry mandated by the Legislature was to find actual value of the property to be assessed, was a resort to fictions. A fiction is not allowed to obscure the facts when the facts become important. The important facts which the fictions tended to obscure in 1958 and 1959 were that in 1956 and 1957 appellee took 95 percent of the actual value of the Nebraska property of appellant for basic value rather than 70 percent, which the law required, and based the assessment of the property thereon. Appellee then applied to the incorrect amounts found for those years a conversion factor in 1958 of 1.429 and in 1959 of 1.4286 which was in any event only permissible when the basic value of the property was fixed at 70 percent of actual value and thereby appellee added in 1959 more than $55 million to the actual value of the property of appellant in this state.

Appellee assigned 21.96 percent of the total value of the railroad property in 1959 to the Nebraska property of appellant. This allocation is uncontested. The amount of it was $155,174,171. That is the actual value of the property in 1959 concerned in this litigation and the duty of appellee was to assess it at 35 percent. Appellee destroyed any trace of reasonableness or realism by deducting 5 percent from that amount and multiplying the remainder by 1.4286 to produce a value of $210,597,729 which appellee called the actual value of the Nebraska property. The action of appellee in inflating the value of the Nebraska property of appellant by the devices it used was arbitrary, unreasonable, and contrary to law.

The original assessment order of July 15, 1959, was adopted by only two members of the board voting for it. One member voted against it, one member abstained

from voting, and one member was absent. The use of the matter contained in section IV of the order of assessment was not a mistake, an inadvertence, or because of insufficient information. It was done advisedly and arbitrarily. The Tax Commissioner of the state advised against the use of it. He presented a proposed order of assessment wholly eliminating that formula. He advised that the facts and the law required a reduction in railroad valuations for assessment purposes. One of the members who voted for the assessment order said in a voluntary, formal statement he would never be a party to extending the type of relief suggested to any special interest at the unavoidable tax expense of Nebraska farmers, main street merchants, and homeowners. However, the same statement tacitly conceded that railroad property had been overassessed and this was illustrated by a reference to 1955 when, as asserted in the statement, the "valuation should have declined because of the change in base, it actually increased 5 million dollars." The other member who supported the 1959 assessment order said he opposed any concession to any special interest group when the average taxpayer would have to make up the difference from his own pocket. Neither of these members mentioned anything concerning the value of the property to be assessed nor did they undertake to show where the judgment of the Tax Commissioner was wrong. The Tax Commissioner stated that appellee had no right to consider such an effect among taxpayers and that its only right and duty were to make an assessment of railroads at the same level as all other assessments. He appropriately said if appellee was to refuse to reduce values because other taxpayers will make up the difference, then no taxpayer, whatever his status or station, could ever get relief from unjust taxation. The observations in Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146, are appropriate: "The case is not one of mere errors in judgment in following a proper meth-

od, * * * but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity."

The method employed by appellee in assessing the property of appellant in Nebraska as exhibited by section IV of its assessment order of 1959 resulted in the assessment of the property at 47½ percent of its actual value as found by appellee and described in its order as allocation to Nebraska. The facts of the assessment may be correctly and simply stated as follows:

Actual value	$155,174,171
Assessment	47½%
	73,709,205
Less local assessment	3,694,061
1959 State Board Assessment	$ 70,015,144

The difference between 47½ percent and 35 percent of the actual value of the property when the very large valuation involved is considered is not substantial or approximate uniformity as contended by appellee or as required by the Constitution and applicable statutes of the state.

All tangible property has since September 20, 1957, been required to be valued at its actual value and to be assessed at 35 percent of such actual value. § 77-201, R. R. S. 1943. The evidence establishes that all tangible property except railroad property was assessed at not more than 35 percent of its actual value. The Constitution provides that taxes shall be levied by valuation uniformly and proportionately upon all tangible property, subject to exceptions not important to this case. Art. VIII, § 1, Constitution of Nebraska.

Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment, *ante* p. 77, 101 N. W. 2d 856, is decisive of the conclusion that the 1959 assessment of the Nebraska property of appellant by use of the

formula in section IV of the assessment order is arbitrary, discriminatory, and contrary to law. Therein it is said: "It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof, and any substantial departure therefrom was a disregard of the legislative mandate and constituted an arbitrary valuation and assessment of the property. * * * A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes. * * * It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value. * * * Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state and one owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay."

Appellee argues in support of the assessment that there is no proof that actual value of the property is different than that determined by it. The evidence of actual value was all produced by appellant and it was adopted by appellee in arriving at what was designated system value. Testimony was produced and not contradicted that system value was actual value and that allocated value of the Nebraska property was actual value. The proceedings of appellee from 1940 to 1955, when the statute was amended from requiring assessment of actual value to basic value, show that for 12 years appellee first found system value of the property

of appellant by using the market value of the stocks and bonds and the value ascertained by capitalizing its net income at 6 percent and in later years by the addition of historic or book value. The system value was allocated to Nebraska by the formula with minor variations used by appellee for that purpose in the 1959 assessment. In each of the years 1940 to 1955 system value and Nebraska allocated value were found by appellee to be the 100 percent actual value of the railroad and the 100 percent actual value of the property allocated to Nebraska, respectively. The record or the argument of appellee yields no solution of the problem of how a method by which appellee produced actual value for so many years suddenly in 1959 produced something different.

Appellee vaguely suggests that the difference in the figure of $155,174,171, allocation to Nebraska in the 1959 assessment order, and the inflated figure of $210,597,729 produced by the use of the conversion factor could have been considered by appellee "* * * the other statutory elements which the Board is found (bound) to follow * * *" or "* * * that economic and other conditions were taken into account in arriving at assessed value." The statute is mandatory that the record of the assessment must clearly show the basis of the assessment of the railroad property, how it was arrived at, the items included, and the total of the items. § 77-609, R. R. S. 1943. This the record of the 1959 assessment of appellant does. Appellee cannot now be heard to say something undisclosed by the record was valued and included. In Fargo v. Hart, 193 U. S. 490, 24 S. Ct. 498, 48 L. Ed. 761, the court said: "We may add that it appears * * * that 'the minutes of said state board of tax commissioners' are in evidence. This means the complete minutes. It must be assumed that the minutes show all that took place in the proceedings, and therefore that we have before us all the evidence that was put in as well as a report of what was said." The effect of what appellee says is that an assessment by it can be

sustained even though there is no evidence to support it or that the proof presented to appellee is in fact contrary to the assessment if appellee recites that a certain figure is the actual value of the property. This is contrary to the plain requirements of the statute and the decisions of this court. It is obvious that the statute in this respect was made detailed and specific to prevent that very procedure in making an assessment of property.

The findings of appellee contained in sections I, II, and III of its assessment order of July 15, 1959, concerning the property of appellant are correct and they are each adopted by this court.

The assessment of the 1959 property of appellant in Nebraska as contained in section IV of the assessment order of appellee of July 15, 1959, should be and it is hereby reversed.

It should be and is adjudged that the actual value of the property of appellant for 1959 in Nebraska is the sum of $155,174,171; that from 35 percent thereof or $54,310,960 there should be deducted the value of the locally assessed property of appellant the sum of $3,694,061; and that the 1959 assessment of the property of appellant in Nebraska should be and is $50,616,899.

ORDER REVERSED. JUDGMENT OF ASSESSMENT RENDERED.

IN RE FERDINAND ANANIA.

FERDINAND ANANIA, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS, ROBERT P. SAMARDICK, INTERVENER-APPELLANT.

102 N. W. 2d 49

Filed March 25, 1960. No. 34665.

1. **Appeal and Error.** A petition in error in a district court to test the validity of a final order of an inferior tribunal is an inde-

pendent proceeding the object of which is to obtain a reversal of the order presented for review.

2. ———. The requirement of section 25-1905, R. R. S. 1943, that the plaintiff in error shall file with his petition a transcript of the proceedings containing a final judgment or order sought to be reversed, vacated, or modified is mandatory.
3. ———. In the absence of a transcript as the statute requires, the court in which a petition in error is filed has no jurisdiction to proceed further than to dismiss the petition in error.
4. ———. If the judgment of a district court in a proceeding in error to reverse the final order of an inferior tribunal is sought to be reviewed in this court, the transcript in this court must contain the final order of the inferior tribunal and such other proceedings as are presented for review and correction.
5. ———. The jurisdiction of the district court to consider and set aside a final order of an inferior tribunal does not attach until there is presented to it with the petition in error a duly authenticated transcript of the proceedings containing the final order of which complaint is made.
6. ———. The words "a transcript of the proceedings" as employed to designate what shall be filed with the petition in error include within their meaning duly authenticated copies of the original papers, pleadings, and final order of the inferior tribunal which it is sought to present to the attention and for the action of the appellate court.
7. ———. Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation.
8. ———. An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law.
9. ———. If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein.

APPEAL from the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Appeal dismissed.*

Herbert M. Fitle, Bernard E. Vinardi, Irving B. Epstein, Frederick A. Brown, Benjamin M. Wall, and *Edward M. Stein,* for appellants.

Gross, Welch, Vinardi, Kauffman & Schatz, for intervener-appellant.

Crawford, Garvey, Comstock & Nye and *Webb, Kelley, Green & Byam,* for appellee.

Kennedy, Holland, DeLacy & Svoboda, amici curiae.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The chief of police of the city of Omaha informed appellee, a member of the police department of the city, in writing that he was accused of violating rules and regulations of the Omaha police department, the civil service commission, and its successor, the personnel board of the city, as follows: By falsely making an official report to the chief of police of the city on February 3, 1958, regarding a Smith-Corona portable typewriter No. 2Y3261 to the effect that appellee did not sell it to Patrolman Morris K. Fanger sometime in the year 1957 when in fact appellee did sell the machine to the named patrolman; by conduct unbecoming a member of the police department consisting of a report on February 4, 1958, to the chief of police in the presence of another officer of the police department that appellee did not take or steal the typewriter above described, the property of Leonard Stoller, on or about January 30, 1951, when in fact appellee did take or steal it; and by stealing the said typewriter and three sets of costume jewelry on or about January 30, 1951, which typewriter was the property of Leonard Stoller. Appellee was directed in writing by the chief of police to appear before him at a specific time and show cause why appellee should not be suspended or dismissed from the police force of the city for the violations above charged against him. Hearing was had before the chief of police and he found that each of the charges was true and that it was for the best interests of the police department that appellee be dismissed from it. An order of dismissal of appellee as a member of the police

department of the city was rendered effective February 21, 1958.

Appellee took an appeal from the order of the chief of police to the personnel board of the city of Omaha. A hearing of the matter was had before it which resulted in a finding that each of the accusations made against appellee by the chief of police was established by the evidence; that appellee had conducted himself in such a manner that his value to the police department had been destroyed; that his presence on the police force would not be in the best interests of the police department; that the order of the chief of police should be affirmed; and that appellee should be dismissed from the department as provided in the order of the chief of police. The personnel board affirmed the order of the chief of police.

Appellee by petition in error filed in the district court for Douglas County alleged that the accusations made concerning him by the chief of police were based on ordinances, rules, and regulations which had been previously repealed by the home rule charter of Omaha adopted by the electors thereof which became effective May 27, 1957; that the rules appellee was accused to have violated did not in fact exist; that the proceedings had before the chief of police concerning appellee were unauthorized by any provision of law; that there was no valid order of the chief of police that could have been reviewed by the personnel board; that no rules for procedure before it were adopted or in effect; and that the findings and orders of the chief of police and of the personnel board were, respectively, not supported by but were contrary to the evidence and contrary to law. Appellee asked that the order of his dismissal as a policeman from the police department of Omaha be reversed and vacated. The answer of appellants was in effect a general denial of the statements contained in the petition in error.

The district court found that none of the charges

made against appellee were established by evidence; that the order of dismissal of appellee as a policeman from the police department of Omaha made by the chief of police was not sustained by evidence; that the order of the personnel board affirming the order of the chief of police was not sustained by evidence; that the order of each of them should be reversed and set aside; and that appellee should be restored to his position as a member of the police department of Omaha as of the date of the purported dismissal of him therefrom by order of the chief of police. A judgment was rendered in harmony with the findings. The motion for a new trial was denied and this appeal was taken.

Appellants filed a pleading herein which states that they dismiss their appeal. Thereafter Robert P. Samardick made application to intervene in the cause and to prosecute the appeal. Authority therefor was granted him by order of this court. The intervener argues that the district court did not obtain jurisdiction of the subject matter of this cause for the reason that plaintiff in error did not file an authenticated transcript containing the final order sought to be reversed and vacated with his petition in error in the district court. The record is silent as to the filing of such transcript at any time herein.

A petition in error in the district court to test the validity of an order of an inferior tribunal is an independent proceeding the object of which is to obtain reversal of the order presented for review. From v. Sutton, 156 Neb. 411, 56 N. W. 2d 441.

The relevant part of section 25-1905, R. R. S. 1943, states: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified." That language was code section 586, R. S. p. 497, and it has since been continued. Section 25-1906, R. R. S. 1943, is as follows: "Judges of county courts, justices of the peace and other judicial tribunals

having no clerk, and clerks of every court of record, shall, upon request and being paid the lawful fees therefor, furnish an authenticated transcript of the proceedings, containing the judgment or final order of said courts, to either of the parties to the same, or to any person interested in procuring such transcript." That was code section 587, R. S. p. 497, and it has since been retained.

In Saussay v. Lemp Brewing Co., 64 Neb. 429, 89 N. W. 1048, it is said: "When the judgment of a district court, in a proceeding in error to review the judgment of a justice of the peace, is sought to be reviewed in this court, the transcript in this court must contain the judgment of the justice of the peace and such other process and proceedings as are sought to be reviewed or corrected." The opinion in that case recites: "The requirement of section 586 of the Code, that 'the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified,' applies equally to proceedings in error in the district court and in this court, and in the absence of such a transcript the court has no jurisdiction to proceed further than to dismiss the petition in error. Zink v. Westervelt, 52 Nebr., 90."

In Fike v. Ott, 76 Neb. 439, 107 N. W. 774, the court said: "The jurisdictional feature of a transcript filed in this court is the 'judgment, decree or final order sought to be reversed, vacated or modified.' Sections 586 and 675 of the code."

New Home Sewing-Machine Co. v. Thornburg, 56 Neb. 636, 77 N. W. 86, declares: "The jurisdiction of the district court to review and reverse the judgment or final order of an inferior court, board, or other body exercising judicial functions does not attach until there is presented to it a duly authenticated transcript of the record containing the judgment or final order complained of."

Ritchey v. Seeley, on rehearing, 68 Neb. 129, 97 N. W. 818, contains this: "Repeated decisions of this court hold that in order to entitle an aggrieved party to a review of the record of the trial had in the district court, the requirements of the statute providing for a review by error proceedings must be complied with—that is, that the error proceedings must be begun within the time limited; that a petition in error must be filed in the reviewing court, accompanied by a duly authenticated transcript of the record which it is sought to have reviewed as a basis for the obtaining of such rewiew (review); that thereupon a summons in error may issue, and service be had, and the adverse party thus brought into court and subjected to its jurisdiction. * * * We have decided repeatedly that a summons in error can not issue until after the filing of a petition in error with a transcript of the record of the district court, and that these preliminary steps were necessary in order to give the court jurisdiction."

Slobodisky v. Curtis, 58 Neb. 211, 78 N. W. 522, states: "* * * It is indispensable to jurisdiction that there should be filed with the petition in error, and within the time fixed by statute, a transcript of the proceedings of the district court containing the final judgment sought to be reviewed."

In In re Estate of Greenamyre, 133 Neb. 693, 276 N. W. 686, it is stated: "In the case at bar, the first transcript filed contained no final order, and a summons in error issued on such a record was void. And a later transcript of additional action taken by the county court could not give jurisdiction by virtue of the summons in error issued and served before any final order had been entered in the county court."

From v. Sutton, *supra,* states: "Section 25-1905, R. R. S. 1943, requires that a transcript be filed with the petition containing the final order sought to be reversed, vacated, or modified."

Jurisdiction of the subject matter of the cause did

not attach in the district court because there was no transcript filed in that court of the proceedings before the personnel board containing the final order sought to be reversed and vacated.

It is mandatory that the transcript be properly authenticated and timely filed to vest the appellate court with jurisdiction of the subject matter.

In Brockman Commission Co. v. Sang, 52 Neb. 506, 72 N. W. 856, the court said: "This court does not acquire jurisdiction of a cause brought here on appeal or error, where the transcript of the judgment, or final order sought to be reviewed, has not been properly authenticated by the clerk of the district court."

It is stated in Melcher v. Haley, 58 Neb. 729, 79 N. W. 707: "A petition in error will be dismissed when the final judgment or order assailed is not authenticated by the certificate of the clerk of the trial court." See, also, Rooney v. Farrell, 62 Neb. 611, 87 N. W. 338; New Home Sewing-Machine Co. v. Thornburg, *supra;* Slobodisky v. Curtis, *supra.*

The words "a transcript of the proceedings" designate what shall be filed with the petition in error and they include in their meaning duly certified copies of the original pleadings, papers, and orders in the proceeding before the court or body which it is alleged committed the error sought to be presented to the appellate court for consideration and decision. The production of the original pleadings, papers, and orders in lieu of an authenticated transcript is not contemplated and will not suffice. There is no substitute for an authenticated transcript of the proceedings which will cause jurisdiction of the subject matter of the cause by the appellate court to exist. Royal Trust Co. v. Exchange Bank, 55 Neb. 663, 76 N. W. 425, asserts: "The words, 'A transcript of the proceedings,' as employed in section 586 of the Code of Civil Procedure to designate what shall be filed with a petition in error, include within their meaning duly certified copies of the original papers

and pleadings in the trial court, which it is sought to present to the attention of the appellate court. The filing of the original papers and pleadings is not contemplated, and will not fulfill the requirements of the statute."

In Moore v. Waterman, 40 Neb. 498, 58 N. W. 940, it is said: "The filing of a transcript authenticated by the clerk is jurisdictional. Surely it would not be contended that an appeal from a justice of the peace to the district court could be effected by the parties getting possession of the justice's docket and by stipulation filing his docket in the district court instead of a certified transcript of the entries thereon. This case stands in no better light."

In Lee v. State, 124 Neb. 165, 245 N. W. 445, it is stated: "It is to be remembered that the necessity of having a proper record of the action complained of is not merely enforced by the wording of the controlling statute, but emphasizes a jurisdictional fact. * * * The words 'a transcript of the proceedings,' as employed * * * to designate what shall be filed with the petition in error, include within their meaning duly certified copies of original papers and pleadings * * * which it is sought to present to the attention of the appellate court. The filing of the original papers and pleadings is not contemplated and will not fulfil the requirement of the statute." See, also, School Dist. No. 49 v. Cooper, 44 Neb. 714, 62 N. W. 1084; Smith v. Delane, 74 Neb. 594, 104 N. W. 1054; Brabham v. Custer County, 3 Neb. (Unoff.) 801, 92 N. W. 989.

Appellee argues that appellants appeared generally in the case and tried it on the theory that there was a proper transcript and that the district court had jurisdiction; and that because of the participation and acts of appellants and the failure to raise an issue as to the lack of jurisdiction of the district court of the subject matter until the cause was in this court, appellants cannot now complain in that regard and neither can the

intervener who has no better right to do so. This argument is faulty. Barney v. Platte Valley Public Power & Irr. Dist., 144 Neb. 230, 13 N. W. 2d 120, contains the following: "The appellate jurisdiction of a court is contingent upon timely compliance with constitutional or statutory methods of appeal. Failure to comply with the required conditions terminates the potential power of an appellate court to acquire thereafter any jurisdiction to review the judgment below. * * * Appellate jurisdiction of a case cannot be conferred upon a court by any action of the parties. The want of such jurisdiction may be taken advantage of at any stage of the proceedings. An appellate court cannot pass on the merits of a case falling within its appellate jurisdiction unless its jurisdiction is invoked in the manner prescribed by constitution or statute." See, also, From v. Sutton, *supra;* Roberts v. City of Mitchell, 131 Neb. 672, 269 N. W. 515; Moore v. Waterman, *supra.*

Appellee to sustain his argument places much reliance upon Coleman v. Spearman, Snodgrass & Co., 68 Neb. 28, 93 N. W. 983, and Whitcomb v. Chase, 83 Neb. 360, 119 N. W. 673, which employed language to the effect that if an unauthenticated transcript was filed in the district court and the litigation was contested therein to a determination without objection because of the deficiency and its effect, the jurisdiction of the district court could not be assailed for the first time after the case reached this court. These cases were distinguished in Fromholz v. McGahey, 85 Neb. 205, 122 N. W. 879, and therein inferentially the doctrine of them in the regard noted above was disapproved by this language: "We have uniformly held that filing an unauthenticated transcript of a judgment of the district court did not give us jurisdiction of the controversy, but that the terms of the statute must be observed and a certified transcript of the judgment filed within the time limited by law." It should also be noted that in Whitcomb v. Chase, *supra,* the opinion says: "It is argued that the

district court has no original jurisdiction in cases of this kind; that it only obtains jurisdiction by appeal, and if the appeal is not properly perfected that court has no jurisdiction. In support of this proposition many cases are cited which hold that jurisdiction of the subject matter of an action cannot be conferred by consent. That this is the well-established rule cannot now be questioned; but we are of opinion that it has no application to the facts of this case."

There are five motions pending herein which were submitted at the time of the argument and submission of the appeal. What has been and is hereafter said makes it unnecessary to dispose of them separately. The conclusion of the opinion as to the appeal makes the motions meaningless.

The district court acquired no jurisdiction of the subject matter of this litigation and the judgment it rendered was void and did not in any way affect the order of the personnel board or its affirmance of the order of the chief of police dismissing appellee as a policeman from the police department of the city of Omaha. Likewise, the appeal did not vest jurisdiction of the subject matter of the litigation in this court and this appeal should be and it is hereby dismissed. All costs on appeal taxed to appellee Anania.

APPEAL DISMISSED.

RICHARD E. FINNERN, APPELLEE, V. HARRY E. BRUNER, JR., APPELLANT, IMPLEADED WITH ARVELLA D. BRUNER ET AL., APPELLEES.

101 N. W. 2d 905

Filed March 25, 1960. No. 34680.

1. **New Trial: Appeal and Error.** A district court has the same power to hear and determine a petition for a new trial on the ground of newly discovered evidence after an appeal to the Supreme Court as it would have if no appeal had been taken.

2. **New Trial.** A petition for a new trial under section 25-1142, R. R. S. 1943, must show that the grounds alleged could not have been discovered, in the exercise of due diligence, prior to the trial of the case.
3. ———. The alleged newly discovered evidence must relate to the issues joined in the original case. It must be material, competent, and credible, and not merely cumulative.
4. ———. Newly discovered evidence must be of such a substantial nature as to make it appear that if such evidence had been received in the original trial the judgment would probably have been substantially different.
5. ———. Whether or not a party seeking a new trial on the ground of newly discovered evidence exercised due diligence to procure the evidence at the trial must be determined from the facts of each case in which the issue is raised.

APPEAL from the district court for Douglas County: JACKSON B. CHASE, JUDGE. *Affirmed.*

Frost, Meyers & Farnham and *James E. Fellows,* for appellant.

Haney & Walsh, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action which originated by the filing of a petition for a new trial on the ground of newly discovered evidence. The trial court found that the newly discovered evidence was sufficient to warrant a new trial and entered a final order granting a new trial of the case. The defendant Harry E. Bruner, Jr., has appealed.

The case was previously before this court. Finnern v. Bruner, 167 Neb. 281, 92 N. W. 2d 785. We shall not review the facts and holdings in that case except as they become important to a disposition of the present case.

The former suit was brought to quiet title to Lot 25, Block 2, Ak-Sar-Ben Hill Addition in Omaha, Douglas County, Nebraska. Plaintiff has been the record

title owner of the property since December 28, 1956. The purpose of the suit was to have the title thereto quieted with reference to the lien of a judgment for child support rendered in a divorce decree on March 7, 1922, in favor of Bessie May Bruner and against Harry E. Bruner, Sr., who was the record title owner of the property at a time when the child-support judgment properly became a lien thereon. The amount of the judgment lien at the time the original suit was filed was in excess of $10,000. The decree did not provide that the child-support payments were to be paid into court.

It was contended throughout the former trial that plaintiff was entitled to have the title quieted as against the lien of the child-support judgment on the grounds of the statute of limitations, laches, equitable estoppel, and payment. This court finally determined that the statute of limitations, laches, and equitable estoppel had no application and that the evidence did not sustain a finding that the judgment had been paid. The judgment on the mandate of this court was duly rendered on February 3, 1959. The petition for a new trial alleges new evidence bearing solely upon the question of payment of the child-support judgment.

The new evidence asserted as the basis for a new trial is substantially as follows: On June 15, 1942, the Conservative Savings and Loan Association loaned Harry E. Bruner the sum of $550, which was secured by a real estate mortgage on the property here involved which was duly placed of record. On August 17, 1943, the Conservative Savings and Loan Association made a second loan to Harry E. Bruner in the amount of $750 which included the unpaid balance of the first loan. This mortgage was also secured by a real estate mortgage on the property involved in this suit and was duly placed of record. These real estate mortgages were fully paid and released of record on May 28, 1945.

The evidence further shows that on March 2, 1959, a

Mr. and Mrs. Thomas F. Sheehan, the parents of Thomas J. Sheehan who had sold and warranted the title of the property to plaintiff, called at the office of the Conservative Savings and Loan Association. They discussed with the secretary of the association the difficulties their son was having as a result of the lien of the child-support judgment. The secretary of the association recalled the mortgage transaction with Harry E. Bruner and upon an examination of its files discovered an instrument signed and sworn to by Bessie May Bruner Blake, formerly Bessie May Bruner, which constitutes the new evidence relied on in the present case. The instrument is headed: "IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA Bessie May Bruner, plaintiff, versus Harry E. Bruner, defendant. STATE OF NEBRASKA, DOUGLAS COUNTY, ss." The instrument then recites the following facts, among others: "Affiant further states that the said Harry E. Bruner made each and all of the payments to the undersigned for the support and maintenance of the said children 'until the said Catherine Bruner shall have attained the age of 16 years' in the manner and at the times as required by the provisions of the decree entered in the above entitled action, and that the said Harry E. Bruner paid the attorneys' fees as ordered by the terms of said decree and also paid the costs taxed in said action." The foregoing was sworn to by Bessie May Bruner Blake before a notary public on June 13, 1942. The evidence shows that at the time of the first trial both Harry E. Bruner and Bessie May Bruner Blake were deceased.

The attorney for the plaintiff who commenced and tried the quiet-title suit testified as follows: Before commencing the suit in 1957 he checked the records of the clerk of the district court in the divorce action for any record of payment. He checked the probate proceedings in the estates of Harry E. Bruner, Bessie May Bruner Blake, and William Albin Blake, the second husband of Bessie May Bruner. He checked the real estate

records in the office of the register of deeds. He checked the records of the intervening holders of the title to the property. He checked with neighbors in areas of the city where the Bruners had lived before and after their divorce. He testified that for a month before filing the suit he spent much time in searching for some evidence of payment of the child-support judgment without uncovering any tangible evidence that it had been paid.

It is fundamental that a district court has the same power to hear and determine a petition for a new trial on the ground of newly discovered evidence after an appeal to the Supreme Court as it would have if no appeal had been taken. Smith v. Goodman, 100 Neb. 284, 159 N. W. 418; Ward v. Geary, 115 Neb. 58, 211 N. W. 208.

The law does not, however, favor new trials on the ground of newly discovered evidence. A petition for a new trial on the ground of newly discovered evidence must be filed within the terms and in the manner prescribed by sections 25-1143 and 25-1145, R. R. S. 1943. The newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. Such evidence must be competent, material, and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. It must appear that the unsuccessful party had no knowledge of the newly discovered evidence at the previous trial and could not have discovered it by the exercise of reasonable diligence. Smith v. Goodman, *supra*.

The defendant Harry E. Bruner, Jr., first contends that plaintiff's petition did not state a cause of action in that it did not allege that the new evidence could not have been discovered by the exercise of reasonable diligence prior to the former trial. While this precise language is not used in plaintiff's petition, it does allege that great

effort and diligence was employed prior to the trial of the former case by examining the records of the register of deeds and the records of the county and district courts, and in interviewing neighbors for evidence of payment. It further alleges that the instrument alleged to constitute new evidence, a copy of which was attached to plaintiff's petition, was buried in the old files of the Conservative Savings and Loan Association without any knowledge on the part of the plaintiff until it was accidently discovered on March 2, 1959. The allegations as to the exercise of due diligence were clearly sufficient. It is the facts constituting due diligence which must be alleged. Davies v. DeLair, 148 Neb. 395, 27 N. W. 2d 628.

The new evidence discovered was clearly admissible as bearing on the question of payment of the child-support judgment. Whether it was intended as a satisfaction of the child-support judgment, a release as to the specific property upon which the Conservative Savings and Loan Association held a mortgage, or as a protection to the mortgagee as an inducement to the making of the loan, are not for determination in this proceeding. Our only concern here is whether or not a new trial should be granted. It is clear that plaintiff had no knowledge of the instrument at the first trial. The case resolves itself into a question of whether or not the plaintiff could have discovered the instrument in the exercise of due diligence.

The evidence does not show, nor is it contended, that any public record gave an indication of the existence of the instrument. It was retained in the files of the loan company at all times subsequent to its execution. The mortgages were given in 1942 and 1943 and released of record in 1945. We do not think the exercise of due diligence would require a party to interview the former holders of mortgages long since paid off and satisfied in seeking evidence of payment of a judgment. Such an interview would more likely be dictated by mere chance than by logical reasoning. Due diligence as here

used is that diligence which parties ordinarily pursue in preparing for the trial of important litigation. It seems to us that to require the amount of diligence for which defendant contends, in order to obtain a new trial on the ground of newly discovered evidence, would impose too great a burden upon a party to an action.

Whether or not reasonable diligence has been exercised must be determined from the facts of each case in which that issue is involved. Erwin v. Watson Bros. Transfer Co., 129 Neb. 64, 260 N. W. 565. In the instant case the evidence shows that the new evidence came to the plaintiff since the first trial and was not available to him previous to that trial. The plaintiff, under the facts disclosed by the record, exercised due diligence prior to the trial and failed to uncover the instrument asserted as newly discovered evidence. We are of the opinion that the trial court properly concluded that plaintiff was entitled to a new trial on the ground of newly discovered evidence on the issue of the alleged payment of the child-support judgment.

AFFIRMED.

FREDERICK L. DELL ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.
102 N. W. 2d 62

Filed March 25, 1960. No. 34736.

1. **Deeds.** From the standpoint of time, the law in effect at the time of the execution of a deed generally governs its validity and interpretation.
2. **Municipal Corporations.** The city of Lincoln, by the annexation of the village of Havelock, as to rights, obligations, liabilities, and duties imposed upon or possessed by the latter, whether actual or contingent, tortious or on contract, whether already accrued or thereafter to accrue, became, in all respects, the successor of the latter, and subject to the same and identical conditions that were binding upon the village of Havelock.

3. ———. The acknowledgment and recording of a plat laying out land into lots and blocks and showing thereon the streets and alleys, under section 17-417 or 15-106, R. R. S. 1943, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality.

4. ———. Under section 17-558 or 15-701, R. R. S. 1943, whenever any avenue, street, alley, or lane shall be vacated the same shall revert to the owners of adjacent real estate, one-half on each side thereof.

5. ———. A plat made and recorded in statutory form since the enactment of sections 17-417 and 15-106, R. R. S. 1943, is subject to the provisions of section 17-558 or 15-701, R. R. S. 1943, which must be considered in pari materia.

6. ———. While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality under section 17-417 or 15-106, R. R. S. 1943, such fee is a qualified, base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use, and such fee is determined by the vacation of streets and alleys by the municipality as provided for in section 17-558 or 15-701, R. R. S. 1943.

7. ———. The title to a street vested in a city of the primary class or in a city of the second class or village is not generally a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated.

8. ———. That vacation proceedings are had by a village board or a city council at the instance and request, and primarily for the benefit, of certain owners whose property would be benefited by such vacation, is not ground for declaring the vacation ordinance void.

9. Estates. An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that the estate shall automatically expire upon the occurrence of a stated event. Such stated event can be either the happening or the non-happening of a specified occurrence, which can be either certain or not certain to happen, and the conveyor has a possibility of reverter despite the absence of specific words creating any interest in him.

10. Municipal Corporations. Also, the right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of the property has, not in common with the public generally, and of which he

cannot be deprived without due process of law and compensation for his loss.

11. **Statutes.** A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
12. ———. A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights.
13. **Municipal Corporations.** A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it.
14. ———. Under the provisions of Article XI, section 2, of the Constitution of this state, a home rule charter must be consistent with and subject to the Constitution and laws of this state.
15. ———. Under a home rule charter, a city may provide for the exercise of every power, not contravening constitutional inhibitions, connected with the proper and efficient government of the municipality.
16. ———. Where the Legislature has enacted a law affecting municipal affairs, but which is of state-wide concern, such law takes precedence over any action taken by a home rule city under its charter.
17. ———. The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern, and when the Legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities.
18. ———. Cities which have adopted a home rule charter, as authorized by the Constitution, are subject to the general laws of the state, except as to municipal matters of strictly local concern.
19. ———. Whether or not an act of the Legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded with directions.*

Rollin R. Bailey, for appellants.

Ralph D. Nelson and *Henry L. Holst,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs, Frederick L. Dell and Jacquelyn Dell, husband and wife, brought this action against defendant, city of Lincoln, seeking to quiet title to one-half of Sixty-ninth Street, which is within the limits of the city and adjacent to described real property belonging to plaintiffs. Such street had been vacated by a city ordinance, No. 6523, wherein defendant attempted to retain title to the street.

Defendant's answer denied generally; and admitted the allegations of plaintiffs' petition in paragraphs 1, 2, and 4 thereof, which need not be repeated here because of a stipulation of facts hereinafter set forth. Defendant further alleged that defendant is a city of the primary class operating under a home rule charter duly adopted under the Constitution and laws of this state; that at the time of the enactment of ordinance No. 6523, the charter of said city, Article VIII, section 1, as amended May 6, 1947, gave defendant's mayor and city council power by ordinance to vacate any street within the limits of the city, and provided that: " 'whenever any street * * * shall be vacated the same shall revert to the owners of the adjacent real estate, one-half on each side thereof, unless the city reserves title thereto in the ordinance so vacating such a street * * * or land. In the event title is retained by the city, such property may be leased for a period of not to exceed twenty-five years, or may be sold as provided in Article II, subparagraph 5 of Section 1 of this Charter.' " Defendant also alleged that it had two objects in enacting ordinance No. 6523, to wit, the vacation of said street and the reservation of title thereto by defendant, which are

not separable; and that defendant was the owner in fee simple of the tract of land which was formerly Sixty-ninth Street, including the portion thereof adjacent to and west of the real estate owned by plaintiffs. Defendant prayed for dismissal of plaintiffs' petition. Plaintiffs' reply was in the nature of a general denial. The case was tried in the district court upon a stipulation of facts, and the trial court rendered a judgment dismissing plaintiffs' action with prejudice, at plaintiffs' costs. Thereafter, plaintiffs' motion for new trial was overruled, and they appealed, assigning in substance that the judgment was contrary to the evidence and law. We sustain plaintiffs' assignment.

The stipulated facts are that on January 14, 1918, Woods Brothers Silo and Manufacturing Company, hereinafter called Woods Brothers, being the owners of: "Lots Six (6), Seven (7), Eight (8) and Nine (9) of Irregular Tracts in Section Nine (9), Township Ten (10), Range Seven (7), East of the 6th P. M., Lancaster County, Nebraska," which land was then within the limits of the village of Havelock, duly caused the above-described property to be platted and dedicated as Woods Brothers Second Addition to Havelock. Such plat and dedication was on that same date filed with the register of deeds of Lancaster County and on January 18, 1918, was duly accepted by said village.

On November 13, 1918, Woods Brothers, being the owners of Outlot A of said Woods Brothers Second Addition to Havelock, subdivided the north 942 feet of Outlot A into streets, lots, and blocks, they being designated as Blocks 18, 19, and 20, Woods Brothers Second Addition to Havelock, and on that same day such plat and dedication thereof was duly filed in the office of the register of deeds of Lancaster County. On June 29, 1920, Woods Brothers, still being the owners of all of the above-described real estate, renumbered Blocks 18 and 20, so that Block 18 became Block 20, and Block 20 became Block 18, and did file a plat renumbering

said blocks with the register of deeds on the same date. That thereafter, all real estate within Blocks 18, 19, and 20, Woods Brothers Second Addition to Havelock, has been designated for the purpose of clarity only as "Replat of Blocks Eighteen (18), Nineteen (19) and Twenty (20), Woods Brothers Second Addition to Havelock."

Subsequently, in 1930, the city of Lincoln, defendant herein, annexed the village of Havelock, including all of the real estate here in question. On April 3, 1956, plaintiffs, husband and wife, became the owners of Lot 8, Block 18, Replat of Blocks 18, 19, and 20, Woods Brothers Second Addition to Havelock. Such lot is 50 feet wide east and west, 142 feet long north and south, and lies to the east of and adjacent to Sixty-ninth Street. Sixty-ninth Street is 60 feet wide, runs north and south, and is adjacent to and west of the real estate owned by plaintiffs. Sixty-ninth Street, from Fremont Street north 3 blocks to Seward Avenue, has never been opened, maintained, or used as a street or for any other purpose by the public or by the city of Lincoln.

On July 1, 1956, plaintiffs joined in a petition with others requesting defendant to vacate Sixty-ninth Street from the north edge of Fremont Street to the south edge of the alley between Seward Avenue and Colfax Avenue. Thereafter, the city of Lincoln did, by ordinance No. 6523, so vacate Sixty-ninth Street: "* * * subject to title to said street so vacated remaining in the city of Lincoln." Defendant claimed the right to do so under the provisions of Article VIII, section 1, of the charter of the city of Lincoln, as amended May 6, 1947, which we have heretofore quoted.

Plaintiffs claim that by virtue of Sixty-ninth Street being vacated, they became the owners of that part of Sixty-ninth Street lying adjacent to their property, and they filed this action against the city of Lincoln to quiet title to the same. Plaintiffs argued that in 1918, when Woods Brothers platted and dedicated the described real estate involved, it was located in the village of Havelock;

that the title to the area designated as a street was at that time governed by what is now sections 17-417, 17-418, 17-419, 17-420, 17-421, and 17-558, R. R. S. 1943, which have remained without amendment affecting the question here involved. In that connection, section 17-558, R. R. S. 1943, gives second-class cities and villages authority to vacate any street within the limits of the city or village, and provides in part that: "Whenever any * * * street * * * shall be vacated, the same shall revert to the owners of the adjacent real estate, one half on each side thereof." Also, section 15-701, R. R. S. 1943, as it existed during all times here involved, gave cities of the primary class like authority to vacate streets, and contained a provision identical with that just heretofore quoted.

Also, section 17-417, R. R. S. 1943, provided that: "The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the premises platted as is on such plat set apart for streets or other public use, * * *." See, also, section 15-106, R. R. S. 1943, which is identical in material substance.

In that connection, as stated in 16 Am. Jur., Deeds, § 11, p. 444, the general rule is that: "From the standpoint of time the law in effect at the time of the execution of a deed governs its validity and interpretation." See, also, 26 C. J. S., Deeds, § 11, p. 596. In Norris v. Tower, 102 Neb. 434, 167 N. W. 728, we said: "Generally speaking, the laws in force when a contract is entered into form a part of it and enter into its obligation."

In such light, the only statutory or charter provisions which have been enacted or amended since the property and street here involved were platted and dedicated in 1918 and which may affect the issue involved, are the enactment of section 15-113, R. R. S. 1943, which authorized defendant city to annex the village of Havelock, and the amendment of May 6, 1947, to the city's charter, same being Article VIII, section 1, thereof, upon which the city primarily relies. All other pertinent legislative

or charter provisions have remained the same, unless reference is inferentially made to Laws of Nebraska, 1959, Chapter 44, page 225, which is hereinafter discussed.

In 1930, pursuant to sections 15-111 to 15-113, R. R. S. 1943, defendant city annexed the village of Havelock. In that respect, section 15-113, R. R. S. 1943, provides in part: "Upon such consolidation taking effect in the manner herein provided, the charter, laws, ordinances, powers, and government of such cities of the primary class, shall at once extend over the territory embraced within any such city or village so consolidated with it; and such city of the primary class shall succeed to all the property and property rights of every kind, contracts, obligations, and choses in action of every kind held by or belonging to the city or village consolidated with it; and it shall be liable for and assume and carry out all valid contracts, obligations, franchises, and licenses of any such city or village so consolidated with it."

In Enyeart v. City of Lincoln, 136 Neb. 146, 285 N. W. 314, we interpreted such annexation statute, and held: "The city of Lincoln, by the annexation of the city of University Place, as to rights, obligations, liabilities, and duties imposed upon or possessed by the latter, whether actual or contingent, tortious or on contract, whether already accrued or thereafter to accrue, became, in all respects, the successor of the latter, and subject to the same and identical conditions that were binding upon the city of University Place."

In 62 C. J. S., Municipal Corporations, § 76, p. 184, referring to streets and public highways, it is said, citing authorities: "On the other hand, the municipality takes such public ways in trust for the public, subject to established grades and rights reserved by a dedicator, and there are imposed on it the same municipal duties and liabilities as to streets, highways, and bridges in the annexed territory as rest on it with respect to those in the original territory."

By virtue of section 15-113, R. R. S. 1943, defendant city succeeded "to all the property and property rights of every kind * * * held or belonging to the city or village consolidated with it * * *." In other words, despite such annexation statute and interpretation thereof, defendant now proposes that we interpret and apply the statutes existing at the time of the plat and dedication of the property in 1918, and the charter amendment adopted in 1947, some 17 years after annexation, in such manner as to enable defendant city by ordinance to claim a greater legal interest in the street involved than that possessed by the annexed village of Havelock. We do not agree with that proposal.

Be that as it may, if we assume that upon the annexation of the village of Havelock in 1930, the area platted and dedicated as a street became subject to the laws of a primary city as they then existed, we arrive at the same result in determining the right, title, and interest of plaintiffs and defendant city.

In that connection, defendant was then governed by section 15-106, Comp. St. 1929, now section 15-106, R. R. S. 1943, section 15-701, Comp. St. 1929, now section 15-701, R. R. S. 1943, and Article VIII, section 1, of the defendant city's charter for 1920. Section 15-106, R. R. S. 1943, still provides in part: "The proprietor of any land within the corporate limits or contiguous thereto may lay out such land into lots, blocks, and public ways, * * *. When such plat is so made, acknowledged and certified, and is approved by the mayor and council, the same shall be filed and recorded in the office of the register of deeds of the county. It shall thereupon be equivalent to a deed in fee simple to the city, from the proprietor, of all streets * * * and of such portion of the land as is therein set apart for public use * * *."

Section 15-701, Comp. St. 1929, then provided in part: "The mayor and council shall have power by ordinance, to * * * vacate * * * any street * * *. Whenever any street * * * shall be vacated the same shall revert to the

owners of the adjacent real estate, one-half on each side thereof."

Also, Article VIII, section 1, charter of the city of Lincoln for 1920, then provided: "The City Council shall have power by ordinance, to * * * vacate * * * any street * * * within the limits of the city, * * *; Provided, further, whenever any street * * * shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof." As we view it, such provisions relate to the same subject, are in pari materia, and should be construed together.

In such respect, also, sections 17-417 and 17-558, R. R. S. 1943, controlling cities of the second class and villages, sections 15-106 and 15-701, R. R. S. 1943, controlling cities of the primary class, and Article VIII, section 1, Lincoln city charter for 1920, were materially identical in force and effect, when the village of Havelock was annexed by defendant in 1930. Be that as it may, the legal force and effect of platting and dedicating real property in cities of the second class and villages, and the vacation of streets therein, should be and is binding upon cities of the primary class upon annexation by it of cities of the second class and villages.

As recently as Belgum v. City of Kimball, 163 Neb. 774, 81 N. W. 2d 205, 62 A. L. R. 2d 1295, citing authorities, we held: "The acknowledgment and recording of a plat laying out land into lots and blocks and showing thereon the streets and alleys, under section 17-417, R. R. S. 1943, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality.

"Under section 17-558, R. R. S. 1943, whenever any avenue, street, alley, or lane shall be vacated the same shall revert to the owners of adjacent real estate, one-half on each side thereof.

"A plat made and recorded in statutory form since the enactment of sections 17-417 and 17-558, R. R. S. 1943,

is subject to the provisions of both sections which must be considered in pari materia.

"While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality under section 17-417, R. R. S. 1943, such fee is a qualified, base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use, and such fee is determined by the vacation of streets and alleys by the municipality as provided for in section 17-558, R. R. S. 1943." The same rules apply to sections 15-106 and 15-701, R. R. S. 1943. See, also, Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N. W. 2d 76, which involved a city of the first class. Therein we held, citing authorities, that: "The title to a street vested in a city is not generally a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated."

As early as Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N. W. 1002, this court held: "Where a village board, acting by virtue of subdivision 27, section 69, chapter 14, article 1, Compiled Statutes, vacates a street, avenue, alley or lane, the land within such street or alley reverts to the owners of the adjacent real estate, one-half on each side thereof.

"That vacation proceedings are had by a village board at the instance and request, and primarily for the benefit, of certain owners whose property would be benefited by such vacation, is not ground for declaring the vacation ordinance void." In that case, such cited statute contained a provision that: " 'whenever any * * * street * * * shall be vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof.' " See, also, State ex rel. City of Lincoln v. Chicago, R. I. & P. Ry. Co., 93 Neb. 263, 140 N. W. 147, and Dell v. City of Lincoln, 168 Neb. 174, 95 N. W. 2d 336, the same case as that at bar, wherein in a former appeal we pointed out that the charter provision upon which defendant city relied in support of its contention

that it superseded the statutes, was not presented in the record. In any event, we pointed out in that opinion that section 15-701, R. R. S. 1943, empowered the mayor and council of a city of the primary class by ordinance to vacate any street within the limits of the city, but that the same section provided that when any street is so vacated, the same shall revert to the owners of the adjacent real estate, one-half on each side thereof. Such is the universal rule under comparable statutes.

Plaintiffs now argue that the greatest possible interest which defendant city could possess after it annexed the village of Havelock, including Sixty-ninth Street, was a fee simple determinable title, subject to being determined or diverted upon vacation of the street by defendant, which has occurred, and that plaintiffs are owners in fee simple absolute of one-half such street adjacent to their real property. We agree. On the other hand, defendant city contends that Article VIII, section 1, of the city charter as amended May 6, 1947, which has been heretofore quoted, has superseded relevant provisions of the foregoing original statutes, sections 17-558 and 15-701, R. R. S. 1943, because it was a matter of strictly local municipal concern, and that, having reserved title to such street in ordinance No. 6523, which vacated same, defendant has now increased its title to the vacated street from a fee simple determinable to an absolute fee simple title thereto. We do not agree.

As said in Restatement, Property, § 44, p. 121: "An estate in fee simple determinable is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that the estate shall automatically expire upon the occurrence of a stated event." Also, contrary to defendant's contention, as stated in "Comment on Clause (b)," p. 124: "The 'stated event,' within the meaning of that term * * * can be either the happening, or the non-happening, of a specified occurrence, and can be either certain, or not certain, to happen." Also, see Comment

f, p. 125. Also, the conveyor "has a possibility of reverter despite the absence of specific words creating any interest in him." See illustration, p. 122.

In Hillerege v. City of Scottsbluff, *supra,* we held that: "The right which an owner of abutting property possesses in a street is different in kind from that possessed by one whose interest is only that of a right-of-way along the street.

"The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street which the owner of the property has, not in common with the public generally, and of which he cannot be deprived without due process of law and compensation for his loss." See, also, 64 C. J. S., Municipal Corporations, § 1701, p. 96; 25 Am. Jur., Highways, § 154, p. 448, citing many authorities from this and other jurisdictions.

In such respect, it will be noted that to sustain defendant's contention under the circumstances presented here would deprive plaintiffs of their property rights in the street without compensation therefor, in violation of Article I, section 21, Constitution of Nebraska, which provides that: "The property of no person shall be taken or damaged for public use without just compensation therefor," and Article I, section 3, Constitution of Nebraska, which provides that: "No person shall be deprived of life, liberty, or property, without due process of law," which neither the state nor the city has any authority to do. In that connection, such issues were evidently not raised in Van Valkenberg v. Rutherford, 92 Neb. 803, 139 N. W. 652. Therein the city had deeded the vacated portions of the street to the adjacent property owners and parties plaintiff therein owned no real estate abutting on the vacated street, and the closing thereof did not interfere with ingress to or egress from their premises. Such opinion is not controlling here.

Section 16-611, R. R. S. 1943, relied upon by defend-

ant, applies only to cities of the first class, and in any event it has no relation to streets which have been platted and dedicated, as in the case at bar. In that connection, section 15-701, R. R. S. 1943, was amended by Laws of Nebraska, 1959, Chapter 44, page 225, by adding thereto the following italicized portions and removing the portion in parenthesis, as follows: "The mayor and council shall have power by ordinance to open, widen or otherwise improve, vacate, care for, control, name, and rename any street, avenue, alley or lane, parks, and squares within the limits of the city, and also to create, open and improve any street, avenue, alley or lane; *Provided, all damages sustained by the owners of the property thereon shall be ascertained in the manner set forth in sections 76-704 to 76-724; and provided further,* whenever any street, avenue, alley or lane shall be vacated, the same shall revert to the owners of the adjacent real estate, one half on each side thereof, *unless the city reserves title thereto in the ordinance vacating such street, avenue, alley or lane. In the event title is retained by the city, such property may be leased for such periods and on such terms as the council may by ordinance authorize, or may be sold as provided by the city.* (The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.)"

In such situation, we have held that: "A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights." Travelers Ins. Co. v. Ohler, 119 Neb. 121, 227 N. W. 449.

In School District of Omaha v. Adams, 151 Neb. 741, 39 N. W. 2d 550, we held that: "A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed." See, also, State

ex rel. City of Grand Island v. Union Pacific R. R. Co., 152 Neb. 772, 42 N. W. 2d 867.

Such 1959 amendment has no application here for two reasons. First, it does not clearly disclose that the act as amended was intended to operate retrospectively; and, second, if it did, the vacation of a street under the provisions of the act in cases such as that at bar would be a violation of Article I, section 21, and Article I, section 3, Constitution of Nebraska, for reasons heretofore stated.

In that connection, Hanson v. City of Omaha, 157 Neb. 403, 59 N. W. 2d 622, reaffirmed that: "A municipal corporation is a creature of the law established for special purposes, and its corporate acts must be authorized by its charter and other acts applicable thereto. It therefore possesses no power or faculties not conferred upon it, either expressly or by fair implication, by the laws which created it or by other laws, constitutional or statutory, applicable to it." See, also, Wagner v. City of Omaha, 156 Neb. 163, 55 N. W. 2d 490.

In connection with Article VIII, section 1, of the city charter as amended May 6, 1947, defendant contends that it deals with a matter of strictly local municipal concern, and still prevails even if in conflict with sections 17-117, 17-558, 15-106, and 15-701, R. R. S. 1943, the statutes in force at the time ordinance No. 6523 was passed which vacated Sixty-ninth Street. On the other hand, plaintiffs contend that where the Legislature has enacted a law or laws affecting municipal affairs which are also of state-wide concern, such laws take precedence over any action taken by such city, under the provisions of a city charter.

In Axberg v. City of Lincoln, 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894, we held that: "Under the provisions of section 2, art. XI of the Constitution, a home rule charter must be consistent with and subject to the Constitution and laws of this state.

"Under a home rule charter, a city may provide for the

exercise of every power, not contravening constitutional inhibitions, connected with the proper and efficient government of the municipality.

"Where the legislature has enacted a law affecting municipal affairs, but which is of state-wide concern, such law takes precedence over any action taken by a home rule city under its charter.

"The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern, and when the legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities.

"Cities which have adopted a home rule charter, as authorized by the Constitution, are subject to the general laws of the state, except as to municipal matters of strictly local concern.

"Whether or not an act of the legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises."

As we view it, statutes which are enacted for the transfer or protection of the property rights of every owner of real property in the state, or those in a proper municipal classification in this state, and the compensation which such owners are entitled to receive for the public use or disposal thereof as well, is of state-wide concern.

Therefore, when the land here involved was platted and dedicated in 1918, the village of Havelock took a fee simple determinable title to the street involved, and when the city of Lincoln annexed the village of Havelock in 1930, said city took a fee simple determinable title only to said street, exactly that and no more. Thus, when defendant vacated Sixty-ninth Street, the title thereto reverted "to the owners of the adjacent real estate, one half on each side thereof," despite any con-

trary provision of defendant's city charter or statutes thereafter amended or enacted.

Finally, defendant contends that the vacation ordinance, No. 6523, was legislative in character, and if the attempted reservation of title in the city was invalid, then the whole ordinance was void, and there was in fact no vacation of Sixty-ninth Street because the intent of the city was that vacation of the street should be subject to title remaining in the city, which provision was inseparable and without which the ordinance would not have been adopted. Assuming for purpose of argument only that the ordinance was legislative in character, it is controlled by the rule that: "If a city ordinance contains valid and void provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid." Arrigo v. City of Lincoln, 154 Neb. 537, 48 N. W. 2d 643.

On the other hand, we held in State ex rel. Nelson v. Butler, 145 Neb. 638, 17 N. W. 2d 683, that: "The crucial test for determining that which is legislative and that which is executive or administrative is whether the resolution or ordinance of a city council is one making a law or one executing a law already in existence."

The vacation ordinance here involved was in effect simply executive or administrative in character, that is, it was one executing applicable and controlling laws already in existence, which could be done, but only in the form and manner authorized by such laws. In any event, that part of the ordinance which vacated the street was complete and capable of enforcement, and same was not dependent upon that invalid part which attempted to retain title to the street. Defendant's contention has no merit.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is reversed, and the cause is remanded with directions to render a judgment in favor of plaintiffs and against defendant, and granting plaintiffs the relief sought by them

in their petition. All costs are taxed to defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWARD D. KENNEDY, ALSO KNOWN AS EDWARD KENNEDY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

101 N. W. 2d 853

Filed March 25, 1960. No. 34806.

1. **Criminal Law.** In a criminal case, after trial and conviction in the district court by a jury, error proceedings cannot be taken to this court by the defendant therein before a judgment has been rendered or a final order made by the court below, which judgment or final order must include a sentence.
2. **Criminal Law: New Trial.** However, in order to review alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and a ruling obtained thereon.
3. **Criminal Law.** Insofar as Fisher v. State, 153 Neb. 226, 43 N. W. 2d 600, is in conflict herewith the same is overruled.
4. ———. It is a prerequisite to our right to review the trial court's ruling on a defendant's rights under subdivision (2) of section 24-342, R. S. Supp., 1957, that the affidavit therein referred to is filed in the district court.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. On motion of defendant in error to dismiss. On motion of plaintiff in error for bill of exceptions. *Motion of defendant in error to dismiss overruled. Motion of plaintiff in error for bill of exceptions overruled.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett*, for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an error proceeding from the district court

for Douglas County. On February 15, 1960, the defendant in error, the State of Nebraska, filed a motion to dismiss the petition in error filed herein "for the reason that such Petition in Error has not been filed within the time prescribed by the laws of Nebraska, and this Court is, therefore, without jurisdiction in the premises."

Plaintiff in error, Edward D. Kennedy, filed a petition in error, transcript, and poverty affidavit in the office of the clerk of this court on February 10, 1960. Section 29-2306, R. S. Supp., 1957, which is applicable here, provides as follows: "In all criminal cases except when the punishment is capital, writs of error shall be issued by the Clerk of the Supreme Court upon the filing of a petition in error and transcript of the record of the proceedings of the district court and payment of a docket fee of twenty dollars to the Clerk of the Supreme Court; Provided, if any person desiring to obtain such writ of error shall file an affidavit with the clerk of the court that he is unable, on account of his poverty, to pay the costs, the clerk shall enter the suit upon the docket, and upon the entry of final judgment endorse the amount of costs upon the mandate, and the same shall be paid by the county in which the indictment was found." The plaintiff in error complied with the provisions of this statute and this court has jurisdiction of the cause if the above were filed in time. See Goodman v. State, 131 Neb. 662, 269 N. W. 383.

Section 25-1931, R. R. S. 1943, which we have held to be applicable and controlling in criminal cases, provides, insofar as here material, as follows: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of; * * *." See, also, Lee v. State, 124 Neb. 165, 245 N. W. 445; Goodman v. State, *supra;* Fisher v. State, 153 Neb. 226, 43 N. W. 2d 600; Cunningham v. State, 153 Neb. 912, 46 N. W. 2d 636. It should be mentioned that

"judgments and sentences upon convictions for felonies and misdemeanors under the criminal code" are excepted from the procedures provided for by section 25-1912, R. R. S. 1943.

The transcript shows that on October 15, 1959, plaintiff in error, Edward D. Kennedy, defendant below, was found guilty by a jury in the district court for Douglas County on two counts: The first, that of having in his possession burglary tools with the intent of breaking and entering, and the second, that of having in his possession concealed weapons. Thereafter, on October 20, 1959, plaintiff in error filed a motion in the district court to have the verdicts of guilty set aside and for a new trial. This motion was filed within the time provided therefor by section 29-2103, R. R. S. 1943, and sets out therein some of the reasons contained in section 29-2101, R. R. S. 1943, for granting a new trial. This motion was overruled by the trial court on November 30, 1959. Thereafter, on December 11, 1959, the trial court set down for hearing on December 21, 1959, count three of the information wherein plaintiff in error was charged with being an "habitual criminal." See § 29-2221, R. R. S. 1943. Hearing thereon was had accordingly and on that date the trial court found and adjudged plaintiff in error to be an habitual criminal as charged. Thereafter, on January 11, 1960, plaintiff in error was sentenced to serve 15 years in the penitentiary on each of said convictions, such sentences to run concurrently. The error proceeding in this court was filed within 1 calendar month thereafter. The question arises, what constitutes the making of a final order under section 25-1931, R. R. S. 1943, in an error proceeding involving a conviction in a criminal case?

From a check of our holdings it would appear that we have never ruled directly on this question, although our holdings clearly indicate that in a criminal proceeding a conviction and sentence constitute a final order within the meaning of section 25-1931, R. R. S.

1943. See, Kountz v. State, 8 Neb. 294, 1 N. W. 142; Green v. State, 10 Neb. 102, 4 N. W. 422; Gartner v. State, 36 Neb. 280, 54 N. W. 516; Kock v. State, 73 Neb. 354, 102 N. W. 768; Farrington v. State, 116 Neb. 712, 218 N. W. 590; Hoover v. State, 126 Neb. 277, 253 N. W. 359; Goodman v. State, *supra;* Iron Bear v. State, 149 Neb. 634, 32 N. W. 2d 130. See, also, 2 Am. Jur., Appeal and Error, § 140, p. 934; 24 C. J. S., Criminal Law, § 1649, p. 245. As stated in 2 Am. Jur., Appeal and Error, § 140, p. 934: "With reference to what satisfies the requirement of finality, it may be stated generally that no judgment will be regarded as final unless sentence is pronounced."

We think the rule applicable is as follows: In a criminal case, after trial and conviction in the district court by a jury, error proceedings cannot be taken to this court by the defendant therein before a judgment has been rendered or a final order made by the court below, which judgment or final order must include a sentence. See Farrington v. State, *supra.* However, in order to review alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and ruling obtained thereon. See Luster v. State, 142 Neb. 253, 5 N. W. 2d 705. Insofar as Fisher v. State, *supra,* is in conflict herewith the same is overruled.

In other words, error proceedings may be taken from the overruling of the motion for new trial or the imposition of sentence, whichever is the later. In view thereof we find the error proceeding was lodged in this court within the time provided therefor by section 25-1931, R. R. S. 1943, and, because thereof, the motion of the State to dismiss is overruled.

Plaintiff in error filed a request with the clerk of the district court for Douglas County on February 3, 1960, requesting a bill of exceptions containing all of the evidence offered at the trial, a copy of which was delivered to the official court reporter on February 4, 1960. There-

after, on February 10, 1960, he filed a motion in this court requesting an order of this court directing the trial court to order and have prepared a bill of exceptions for him and ordering the cost thereof to be taxed to Douglas County. He bases this request on the poverty affidavit originally filed by him in this court at the time he filed his petition in error and transcript here.

Section 24-342, R. S. Supp., 1957, which is controlling, provides, insofar as here material, as follows: "It shall be the duty of such reporter to furnish on the application of the county attorney, or any party to a suit in which a stenographic report of the proceedings has been made, or upon receipt of notice from the clerk of the district court as provided in section 29-2306.02, a transcribed copy of the proceedings so recorded, or any part thereof. The reporter shall be entitled to receive in addition to his salary, a fee of fifteen cents per hundred words, to be paid by the party requesting the same; except * * * (2) where the defendant in a criminal case, after conviction, shall make an affidavit that he is unable by reason of his poverty to pay for such copy, the court or judge thereof may, by order endorsed on such affidavit, direct the reporter to deliver such transcribed copy to such defendant, and his fees therefor shall be paid by the county in the same manner as other claims are allowed and paid, * * *." It is a prerequisite to our right to review the trial courts ruling thereon that such an affidavit be filed in the district court. In the absence thereof we are without right to do so for our jurisdiction in regard thereto is appellate and not original. If such an affidavit is filed in the district court, then our method of reviewing the trial court's ruling thereon is set out in Fisher v. State, *supra*. In view of the foregoing, the motion of the plaintiff in error is overruled.

But plaintiff in error's counsel has filed his affidavit in this court stating that he made an oral motion for that purpose to the trial judge, which was overruled. Such an affidavit does not supply the deficiency in the

record relating thereto. That can only be done by having the record of the trial court completed, so showing, and then filing a supplemental transcript thereof in this court. But that would serve no useful purpose here for the statute supplies the exclusive method by which an indigent defendant can proceed to obtain a bill of exceptions, if he is entitled thereto, and he must follow that method if he is to obtain the benefits thereunder.

MOTION OF STATE TO DISMISS OVERRULED.
MOTION OF PLAINTIFF IN ERROR FOR BILL OF EXCEPTIONS OVERRULED.

GRAYCE SAAB, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, NOW OMAHA TRANSIT COMPANY, A CORPORATION, APPELLEE.
102 N. W. 2d 59

Filed April 1, 1960. No. 34584.

1. **Negligence.** In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it.
2. **Carriers: Negligence.** A prima facie case of negligence on the part of a common carrier is made in an action by a passenger against the carrier for personal injury where it appears that some defect in appliances or that some act of the carrier's employees in the conduct of its business contributed to the accident.
3. ———: ———. A prima facie case of negligence is not made in a case of injury to a passenger on leaving a vehicle of transportation where the passenger has been given a reasonable opportunity to select his time to alight and to direct his own progress, and who does alight on the street at his destination and becomes a pedestrian.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Schrempp & Lathrop, Henry C. Rosenthal, Jr., and *Simon J. Albracht*, for appellant.

William P. Mueller and *Kennedy, Holland, DeLacy & Svoboda,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Grayce Saab, plaintiff and appellant, against Omaha & Council Bluffs Street Railway Company, now Omaha Transit Company, a corporation, defendant and appellee, for damages for personal injuries which the plaintiff alleges were sustained as a result of the negligence of the defendant. The case was tried to a jury. The jury returned a verdict in favor of the defendant and against the plaintiff. Judgment was rendered on the verdict. A motion for new trial was filed and in due course overruled. From the judgment and the order overruling the motion for new trial the plaintiff has appealed.

In the briefs there are three assignments of error which the plaintiff contends contain grounds for reversal of the judgment. The assignments refer separately to three instructions given by the court. An examination of the assignments and the instructions however discloses that a single question is involved. By these instructions the jury was effectually told that the plaintiff assumed the risk of passing into the condition and situation which caused the injury and the damages which she seeks to recover from the defendant.

There is no material dispute as to the facts upon which the determination herein must depend. A brief but sufficient review of the evidence discloses that on and prior to February 26, 1955, the plaintiff was employed by the First National Bank of Omaha, Nebraska, with time of daily employment starting at 1 p.m. and ending at 9 p.m. She lived at 3744 North Thirty-seventh Street in Omaha, Nebraska. The residence is on the west side of the street. The defendant operates bus lines for transportation of passengers for hire on the streets of

the city of Omaha. One of its lines extends from downtown Omaha to a point where it enters Thirty-seventh Street north of the residence of plaintiff and extends southward and passes this residence. A short distance to the north the bus traverses the intersection of Spaulding Street with Thirty-seventh Street. Spaulding Street extends east and west. In this area Thirty-seventh Street is paved and is generally level. The record from the weather bureau introduced in evidence shows that between February 3, 1955, and February 26, 1955, 7.2 inches of snow fell, and that during that period the daily average temperature ranged from 1° below zero to 34° above zero with only 2 days when the average exceeded 32° above zero. On February 4, 1955, snow was removed on Thirty-seventh Street by the defendant which was accomplished by the use of a blade or plow attached to some type of motorized equipment which caused the snow to be pushed to the west side. This blade was caused to move at an elevation above the pavement of about 1 inch. This would cause or produce a ridge of snow along the side of the street. Whether or not any snow was similarly removed later in the month is not made certain. It is certain that a cindering operation was carried out on February 26, 1955, which may have been accompanied by snow removal.

On February 26, 1955, after finishing her day's work, the plaintiff took passage in downtown Omaha as a regular passenger on a bus of the defendant and was transported to the vicinity of Thirty-seventh and Spaulding Streets where, in response to a signal properly made by her, the bus came to a stop. The bus stopped with the rear door from 27 to 30 feet north of the intersection of Thirty-seventh and Spaulding Streets and about 8 feet east of the west curb line of Thirty-seventh Street. The plaintiff alighted at the rear door and stepped down onto the street.

It is interpolated here that the appeal is in nowise

predicated on either the proposition that the exit was unsafe or that the location in the street where plaintiff was caused to alight was in an unsafe condition.

To the west of plaintiff when she alighted was a ridge of snow extending along the curb which was from 12 to 18 inches in height. There is no evidence as to its width except that its width was perhaps a little greater than its height. After alighting plaintiff took two or three steps, covering a distance of 3 or possibly 4 feet, west toward the ridge of snow and then she stepped over the ridge with her right foot after which she proceeded to bring her left foot over when she fell, as the result of which she received injuries. She was familiar with the surroundings, with the fact that the ridge of snow was there, and also with the fact that there was a passage through the ridge at the intersection with Spaulding Street.

There is no direct evidence and none from which a legally reasonable inference may be drawn as to what caused the plaintiff to fall. The total evidence in this regard is found in the testimony of the plaintiff. There are three instances in her testimony where she described what happened but in none of them does she say or indicate that she has any knowledge as to what caused her to fall. The cause of the fall was, on the record made at the trial, purely speculative and conjectural.

With the record of the evidence in this condition the defendant at the close of the evidence moved for a directed verdict on the ground that the pleaded cause of action had not been proved. This motion was overruled.

The defendant by its brief, in addition to a challenge to the propriety of the assignments of error in the light of the record of the evidence, asserts that there was no evidence upon which to justify the submission of any issue for determination by a jury. In other words the defendant insists that there was no proof of actionable negligence on its part and no proof at all of the

proximate cause of plaintiff's fall and her injuries. In consequence of this it insists that it was entitled to a directed verdict.

It is of course true that if the defendant was entitled to a directed verdict, as it insists, the question relating to instructions, which is the only one presented by the plaintiff on appeal, has no controlling significance, since the defendant obtained at the hands of the jury what it was entitled to under its motion for a directed verdict.

The burden was on the plaintiff, in order to recover, to prove that the defendant was negligent and also that the negligence was the proximate cause of the accident. The appropriate rule is stated as follows in Sipprell v. Merner Motors, 164 Neb. 447, 82 N. W. 2d 648: "In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." The rule and its application are discussed at length in the opinion with citations of authority.

There are decisions of this court which announce what may be regarded as an exception to this rule under circumstances where a passenger is injured upon or while leaving a vehicle of public transportation. Under this exception, if it is made to appear in an action by a passenger against a common carrier for personal injury that some defect in appliances or that some act of the carrier's employees in the conduct of its business contributed to the accident, a prima facie case of negligence on the part of the carrier ordinarily is made. See, Jacobson v. Omaha & C. B. St. Ry. Co., 109 Neb. 356, 191 N. W. 327, 31 A. L. R. 563; Olson v. Omaha & C. B. St. Ry. Co., 137 Neb. 216, 289 N. W. 356.

A prima facie case of negligence however is not made in an instance where a passenger is given a reasonable opportunity to select his time to alight and to direct his own progress, and who does alight on the street at his

destination and becomes a pedestrian. Under such circumstances the carrier is under no duty to guard or protect him in his progress on the street from the place where he alights. See Jacobson v. Omaha & C. B. St. Ry. Co., *supra*.

In this case the record without peradventure discloses that the plaintiff was allowed to safely alight, in a safe place. She became a pedestrian and chose the path of departure from the place where she alighted. She could have chosen to walk 27 to 30 feet to the south where no ridge of snow obstructed passage to the west and to the sidewalk leading to her residence to the south. She chose instead to cross over the ridge of snow. In the light of her voluntary acts and the decisions of this court it may not be said that the defendant was guilty of any actionable negligence.

The plaintiff walked to the ridge of snow and stepped over with her right foot, then she started to bring her left foot over when she fell. What caused her to fall is not disclosed. There is a complete absence of proof of proximate cause and, as has been pointed out, no presumption is available to supply this failure of proof.

It becomes clear therefore that for failure of proof of a cause of action the motion of the defendant for a directed verdict should have been sustained. A discussion therefore of the particular assignments of error is rendered unnecessary since the verdict returned accomplished the proper result.

The judgment of the district court is affirmed.

AFFIRMED.

ELLIS WARREN, APPELLANT, V. OLLIE BOSTOCK, APPELLEE.
102 N. W. 2d 55

Filed April 1, 1960. No. 34742.

1. **Trial.** A motion for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated in the light most

favorable to the party against whom the motion is directed.

2. **Automobiles: Negligence.** A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be considered with all the other facts and circumstances in determining whether or not a party was negligent.
3. **Negligence.** Actionable negligence exists when the injury is the proximate result thereof, and the proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances.
4. ———. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
5. **Negligence: Trial.** When the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury, the determination of the proximate cause is for the jury.

APPEAL from the district court for Adams County: EDMUND NUSS, JUDGE. *Reversed and remanded.*

Conway & Irons and *John N. Marvel,* for appellant.

Stiner & Boslaugh, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, and WENKE, JJ.

CARTER, J.

The plaintiff commenced this action to recover damages sustained to his person in an automobile accident. The defendant denied negligence on his part and asserted that the accident was the result of negligence on the part of plaintiff. Defendant counterclaimed for the damages sustained by his vehicle. The jury returned a verdict for the plaintiff in the amount of $1,375. Defendant moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. The trial court sustained defendant's motion for judgment notwithstanding the verdict and dismissed plaintiff's petition and defendant's counterclaim. The plaintiff has appealed.

The accident occurred 2 miles south of Ayr on U. S. Highway No. 281, a short distance south of an intersection with a county road. U. S. Highway No. 281 is described as a paved black-top road, the pavement being 24 feet wide with a white stripe down the center. The pavement was dry and visibility was good. The area around the intersection was level. There was no other traffic in view on either road at the time of, or immediately before, the accident.

The plaintiff and defendant were both proceeding north towards the intersection on U. S. Highway No. 281 immediately before the collision. The plaintiff testified that he was driving north at a speed of 60 miles an hour. At a point about 400 feet south of the intersection he observed defendant's pick-up truck proceeding north at a point about 300 feet south of the intersection at the approximate speed of 30 miles an hour. Plaintiff stated that he reduced his speed to 55 miles an hour as he neared defendant's truck. Plaintiff stated that at a point 120 feet south of the intersection he turned into the left or west lane of the highway for the purpose of passing the defendant's truck. He gave no warning of his intention to pass. Plaintiff testified that when he was between 70 and 100 feet from defendant's truck the defendant turned his truck to the left across the center line into the path of plaintiff's station wagon. He applied his brakes, leaving skid marks on the pavement for 115 feet, but was unable to avoid a collision. The impact of the 2 vehicles occurred approximately 30 feet south of the intersection. The skid marks showed the right rear wheel of plaintiff's station wagon was 2 feet to the left of the center line. The front of plaintiff's station wagon struck the rear of defendant's truck. After the collision both vehicles were 148 feet north of the intersection, one on the west side of the road, the other on the east.

The defendant testified that his truck was on the right side of the center line of the road at all times

prior to the collision. He states that he did not look for, see, or hear the approach of plaintiff's station wagon from the rear. The defendant said that he gave no signal of any intent to turn left across the center line of the highway.

The plaintiff alleged that defendant was negligent in failing to keep a proper lookout, by driving on the left side of the highway, and by failure to signal his intention to leave the right lane of traffic. The defendant alleged plaintiff was negligent in attempting to pass without allowing a safe distance between his vehicle and that of defendant, in failing to drive on the right half of the highway while crossing an intersection, in failing to maintain proper control of his station wagon, in failing to keep a proper lookout, in driving at an excessive speed under the circumstances, and in failing to decrease his speed in approaching an intersection. The trial court instructed the jury on the applicable statutory rules of the road and it is not contended that the instructions were erroneous in any respect. The sole issue is whether or not the trial court erred in holding that plaintiff was guilty of negligence as a matter of law sufficient to bar a recovery by him.

This court has consistently held that a violation of a statutory rule of the road is not negligence per se, but evidence of negligence only, which may be considered with all the facts and circumstances in determining whether or not a party was negligent. Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491; Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607. It is the rule also that in considering a motion for judgment notwithstanding the verdict the evidence should be construed in the light most favorable to the party against whom the motion is made.

There is evidence in the present case which would sustain a finding of statutory violations of the rules of the road by both parties to the action. But such violations are evidence of negligence only which the jury

may consider in determining whose negligence, if any, was the proximate cause of the accident. The jury evidently found in the instant case that the proximate cause of the accident was not plaintiff's speed, his attempt to pass by turning to the left side of the highway, in failing to sound a warning, nor in failing to keep a proper lookout. It is just as evident that the jury did find that the proximate cause of the accident was the act of defendant in turning his vehicle into the left lane in front of plaintiff's oncoming station wagon without giving any warning of his intention to do so. The evidence was sufficient to sustain such a finding by the jury. Such being the case, the conclusion reached by the jury was within its province, and not a question of law for the court.

The defendant contends that plaintiff in attempting to pass the defendant's truck was negligent in that he was traveling at an excessive speed. We find no evidence in the record that would indicate that the speed of plaintiff's car was a proximate cause of the accident as a matter of law. See Herman v. Firestine, 146 Neb. 730, 21 N. W. 2d 444. Defendant contends also that plaintiff was negligent in not being able to stop his vehicle before striking an object within the range of his vision. This rule, recognized in certain situations, has no application to an operator of a vehicle who undertakes to pass another. The very nature of the movement contemplates the one engaged in passing another vehicle will travel at a greater speed than the vehicle being passed. The application of the rule to one engaged in passing another vehicle would effectively prevent passing other vehicles on a highway without being subject to a charge of negligence as a matter of law. Defendant contends further that plaintiff did not have reasonable control of his station wagon. There is no evidence on this point. The defendant testified that he did not see the plaintiff or his vehicle until after the collision. We have said that the control that is re-

quired of a motorist is such as will prevent the collision with another vehicle not being operated negligently. Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482. Defendant further contends that plaintiff was negligent in attempting to pass defendant's truck at an intersection. Whether or not the statute prohibiting passing at intersections was violated, we do not here determine. There is no evidence to show that such violation, if there was one, proximately contributed to the accident as a matter of law. It is asserted by defendant that plaintiff was negligent in not warning of his intention to pass by sounding his horn. The duty to sound a warning is not an absolute one. Such duty depends largely on the circumstances of the particular case, and whether or not one is negligent in failing to sound a warning before attempting to pass is ordinarily a question for the jury. Adams v. Welliver, 155 Neb. 331, 51 N. W. 2d 739; Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

On the other hand, there is evidence that the defendant turned without warning from the right side of the highway across the center line onto the left side into the path of plaintiff's oncoming station wagon. The jury could properly find under this evidence, as it did, that the defendant was negligent in so doing and that such negligence was the proximate cause of the accident.

Actionable negligence exists when the injury or the loss is the proximate result thereof. The proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. An injury is not actionable if it would not have resulted from the alleged negligence but for the interposition of a new and independent cause. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and with-

out which the injury would not have occurred. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

It is fundamental, of course, that where the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury without which no injury would have occurred, the question is one for the jury to determine. The jury having returned a verdict for the plaintiff which is sustained by the evidence, the trial court was in error in sustaining a motion for judgment notwithstanding the verdict. The judgment of the district court is reversed and the cause remanded with directions to reinstate plaintiff's verdict and enter judgment thereon.

REVERSED AND REMANDED.

KEITH MUENCHAU, APPELLANT, V. WAYNE SWARTS ET AL., APPELLEES.
102 N. W. 2d 129

Filed April 1, 1960. No. 34749.

1. **Actions.** By the phrase "cause of action" is meant, not the formal statement of facts set forth in the petition, but the subject matter upon which the plaintiff grounds his right of recovery.
2. **Actions: Pleading.** So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case.
3. ———: ———. An amended pleading which amplifies, expands, clarifies, or elaborates with greater fullness of detail than was alleged in the original pleading does not state a new and different cause of action.
4. **Pleading.** A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or cure the defects.
5. **Limitations of Actions.** The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action.

6. **Mechanics' Liens.** Mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope.
7. ———. The lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building.
8. ———. A subcontractor must file a sworn statement of the amount due him from the contractor within 60 days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien under the provisions of section 52-102, R. S. Supp., 1955.
9. **Appeal and Error.** A judgment will not be reversed for errors against a party not entitled to succeed in any event.

APPEAL from the district court for Saunders County: JOHN D. ZEILINGER, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellant.

Marti, O'Gara, Dalton & Sheldon, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

Keith Muenchau, plaintiff, brought this action in the district court for Saunders County against Wayne Swarts and Elenore Swarts, husband and wife, defendants, to foreclose a mechanic's lien. The lien was based upon work, labor, material, and services furnished by the plaintiff and his employees upon a house then being constructed by the defendants at Ashland, Saunders County, Nebraska. The trial court found that the plaintiff's original petition set out a cause of action wherein the plaintiff claimed to have a contract with the defendant Wayne Swarts; that the plaintiff's amended petition set out a new cause of action wherein the plaintiff alleged that he was a subcontractor and had an agreement with the contractor; that more than 2 years elapsed between the date of the filing of the mechanic's lien and the date of the filing of the plaintiff's amended petition;

that the new cause of action set out in the plaintiff's amended petition was barred by statute; that the plaintiff, by filing an amended petition, abandoned his claim for a contractor's lien; and that said petition and amended petition should be dismissed at plaintiff's cost. Judgment was rendered in conformity with the findings. The plaintiff filed a motion for new trial. From the overruling of the motion for new trial, the plaintiff perfected appeal to this court.

On February 1, 1957, the plaintiff filed his petition which alleged in substance that the plaintiff was engaged in the business of the sale and installation of plumbing and heating supplies and appliances, including construction and installation of plumbing lines and fixtures; that Wayne Swarts was the record title owner and in possession of certain real estate described in the petition; that on or about August 20, 1955, the defendant Wayne Swarts employed the plaintiff to furnish all work, labor, materials, plumbing supplies, pipes, appliances, fixtures, heating lines, ducts, including a water heater, and to provide plumbing and heating for the residence being constructed upon the real estate owned by defendant Wayne Swarts; that Wayne Swarts orally agreed to pay the plaintiff the fair and reasonable charges for the work, labor, and materials to be performed, installed, and constructed by the plaintiff in accordance with the said oral contract of employment; that Elenore Swarts was the wife of the defendant Wayne Swarts and ratified the oral contract; that thereupon the plaintiff provided all necessary plumbing and heating supplies and materials for the plumbing and heating of the house of defendants, and furnished all work and labor for the installation and construction of said plumbing and heating lines, supplies, and materials necessary for said residence property; that the date of the delivery of the first item of materials and labor to said premises was August 24, 1955, and the furnishing of the last item was on December 8, 1955; that the fair

and reasonable value of said work, labor, and materials so furnished was in the amount of $2,190.93; that on January 31, 1956, plaintiff filed an affidavit and account in the office of the register of deeds of Saunders County as a mechanic's lien on the described premises; and that there was due and owing plaintiff from defendant Wayne Swarts the sum of $2,321.53, for which amount the plaintiff prayed judgment, interest, and costs.

On November 9, 1957, the defendants filed their answer to the plaintiff's petition denying all allegations contained therein except those that were admitted. Defendants' answer admitted that the defendants were the owners of record of the real estate described in the plaintiff's petition, and alleged that William V. North at all times mentioned in the plaintiff's petition was a contractor and builder; that early in August 1955, the defendants and William V. North entered into a contract whereby William V. North agreed to construct a dwelling house and garage for the defendants on the real estate referred to in the plaintiff's petition and to furnish all of the labor and materials therefor, including plumbing and heating; and that defendants agreed to pay William V. North $10,000 for the construction of the dwelling house and garage. Defendants further alleged that they had paid William V. North all of the amounts due and owing to him for the construction of said dwelling house and garage; that they did not have any contract, agreement, or understanding with the plaintiff that the plaintiff was to furnish labor, materials, plumbing, or heating in the erection of the dwelling house; that the plaintiff was a subcontractor when he furnished labor and materials and plumbing and heating for the dwelling house; that said work and materials were furnished by the plaintiff to William V. North, the contractor, not to the defendants or either of them; and that any agreement for the furnishing of labor and materials was between the plaintiff as a subcontractor and William V. North, the contractor. De-

fendants denied that the last item of labor and materials was furnished by the plaintiff on December 8, 1955, and alleged that the last item of labor and materials furnished by the plaintiff in the erection of the dwelling house was furnished on or before November 23, 1955. Defendants alleged that plaintiff's affidavit and account for mechanic's lien was filed on January 31, 1956, and that more than 60 days had elapsed between the date the plaintiff furnished the last item of labor and materials and the date that said mechanic's lien was filed in the office of the register of deeds; and that said filing was therefore void and ineffective.

Thereafter the plaintiff requested the court for leave to file an amended petition. No objection was made to this request by the defendants, and leave was granted to file an amended petition. On October 21, 1958, the plaintiff filed an amended petition. The sole difference and distinction between the plaintiff's original petition and the amended petition was that in the original petition the plaintiff alleged an oral contract between the plaintiff and the defendant Wayne Swarts, while in the amended petition the plaintiff alleged a contract between the plaintiff and the contractor William V. North.

Leave was granted the defendants to file a demurrer to the amended petition. In their demurrer defendants alleged that the plaintiff's amended petition set forth an entirely new cause of action separate and distinct from the cause of action set forth in the plaintiff's original petition; that more than 2 years elapsed from January 31, 1956, the date the plaintiff filed his mechanic's lien, to the date of the filing of the plaintiff's amended petition; that plaintiff's alleged lien was barred by statute; and that the amended petition did not state a cause of action against the defendants or either of them. The trial court overruled the defendants' demurrer and apparently reserved his ruling as to whether or not the amended petition of the plaintiff stated a separate and distinct cause of action than that alleged in the plain-

tiff's original petition until the case was heard.

On October 21, 1958, the defendants filed an answer to the plaintiff's amended petition which was substantially the same as their answer to the plaintiff's original petition, except that the amended answer alleged that the plaintiff's amended petition set forth an entirely new cause of action separate and distinct from that set forth in the plaintiff's original petition; that more than 2 years had elapsed from January 31, 1956, the date the plaintiff filed his mechanic's lien in the office of the register of deeds of Saunders County, to the date of the filing of the plaintiff's amended petition; that the plaintiff's alleged lien was barred by statute; and that the plaintiff had no lien on the real estate described in the plaintiff's petition and amended petition. The prayer was that the cloud on the defendants' title caused by the filing of the mechanic's lien be removed and that the plaintiff's petition and amended petition be dismissed and the defendants recover their costs incurred.

The plaintiff assigns as error the following: The trial court erred in finding that plaintiff's amended petition set out a new cause of action from that set forth in the plaintiff's original petition; the trial court erred in finding that the plaintiff's amended petition was barred by the provisions of section 52-103, R. S. Supp., 1955, and section 52-104, R. R. S. 1943; and the trial court erred in dismissing the plaintiff's petition and plaintiff's amended petition.

The first question presented by this record necessitates the careful consideration of the original petition and the terms of the amended petition held by the trial court to state and introduce a new cause of action.

We have heretofore set out in substance the plaintiff's original petition, the answer of the defendants thereto, the amended petition of the plaintiff, and the defendants' answer thereto.

It appears that the plaintiff, in his amended petition, incorporated as a corrected statement of his claim the

matter contained in the defendants' answer to the effect that the furnishing of work, labor, and materials was not pursuant to a contract with the owner, but under an arrangement made with the general contractor. The question arises, was the identity of the plaintiff's cause of action preserved? On this phase of the case we deem the following to be applicable.

In Myers v. Moore, 78 Neb. 448, 110 N. W. 989, we held: "And by the phrase 'cause of action,' as here used, is meant, not the formal statement of the facts set forth in the petition as a cause of action, but the subject matter upon which the plaintiff grounds his right of recovery." We approved this definition in Burke v. Northup, 98 Neb. 849, 154 N. W. 715; in Zelen v. Domestic Industries, Inc., 131 Neb. 123, 267 N. W. 352; in Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N. W. 2d 545; in Gergen v. Western Union Life Ins. Co., 149 Neb. 203, 30 N. W. 2d 558; in Schwank v. County of Platte, 152 Neb. 273, 40 N. W. 2d 863; in Johnson v. American Smelting & Refining Co., on rehearing, 80 Neb. 255, 116 N. W. 517; and in City of Alliance v. Cover-Jones Motor Co., 154 Neb. 900, 50 N. W. 2d 349.

In Lincoln Joint Stock Land Bank v. Barnes, *supra*, this court said: "So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case."

As stated in Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559: "An amended pleading which amplifies, expands, clarifies, or elaborates with greater fullness of detail than was alleged in the original pleading does not state a new and different cause of action."

In Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100, 80 N. W. 276, the court held: "A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or

cure the defects. * * * The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." See, also, Kennedy v. Potts, 128 Neb. 213, 258 N. W. 471; Chicago, R. I. & P. Ry. Co. v. Young, 67 Neb. 568, 93 N. W. 922; Witt v. Old Line Bankers Life Ins. Co., 92 Neb. 763, 139 N. W. 639; Duffy v. Scheerger, 91 Neb. 511, 136 N. W. 724.

The plaintiff, by filing his amended petition, recognized and adopted factual statements made by the defendants in their answer. By doing so, the plaintiff did not mislead or surprise the defendants with reference to the cause of action stated. The plaintiff's position and contention are that the essence of plaintiff's cause of action at all times was to assert a lien upon the defendants' premises for all necessary work and labor in the installation and construction of plumbing and heating lines, supplies, materials, and labor furnished to defendants' premises. The plaintiff's cause of action is without reference to contract or want of contract with the defendants, but arises by virtue of the furnishing to defendants' premises, for the defendants' benefit, work, labor, and materials as heretofore mentioned.

Considering the above authorities and authorities hereinafter cited relating to the mechanic's lien law it will become apparent that the plaintiff's amended petition did not introduce a new cause of action in this case and also that the statute of limitations, as hereinbefore pointed out, did not run against the plaintiff as contended for by the defendants.

This brings us to a consideration of certain sections of the statutes relating to mechanic's liens.

Section 52-101, R. S. Supp., 1955, provides for a contractor's lien. Section 52-102, R. S. Supp., 1955, provides for a subcontractor's lien. Section 52-103, R. S. Supp., 1955, intends to provide for mechanics' and materialmen's liens. However, this section provides that

any person entitled to a lien under sections 52-101 and 52-102, R. S. Supp., 1955, which would include a contractor and subcontractor, shall make an account in writing of the labor, fixtures, or materials furnished, and after making oath thereto shall, within 4 months from the date of performing such labor or furnishing such materials, file the same in the office of the register of deeds of the county in which such labor, fixtures, or materials have been furnished. This section also provides that when the lien is filed it shall, from the commencement of such labor or furnishing such materials for 2 years after the filing of such lien, operate as a lien on the several descriptions of such structures and buildings, and the lots on which they stand, as named in section 52-101, R. S. Supp., 1955. This, of course, is the statute of limitations referred to by the defendants which they contend bars the plaintiff's action.

This court in Garlichs v. Donnelly, 42 Neb. 57, 60 N. W. 323, had occasion to discuss what we have here referred to as sections 52-102 and 52-103, R. S. Supp., 1955. The court said: "The provision of the mechanics' lien law applicable to subcontractors is found in section 2, chapter 54, of the Compiled Statutes (1893), and seems to be an independent rule governing the manner in which the claim of a subcontractor shall be filed. * * * While the language with which section 3 (Comp. St., 1893) begins is broad enough to cover subcontractors as well as contractors, it is evident * * * that the section just named applies to one class entitled to liens, while section 2, complete in itself, applies to subcontractors alone."

The above language explains the difference in the two sections of the statutes above mentioned as they relate to a subcontractor's lien.

In the case of Rosebud Lumber & Coal Co. v. Holms, 155 Neb. 459, 52 N. W. 2d 313, this court said: "Mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectu-

ate their objects and purposes and protect all claimants within their scope * * *." See, also, Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N. W. 2d 298; Way v. Cameron, 94 Neb. 708, 144 N. W. 172; White Lake Lumber Co. v. Russell, 22 Neb. 126, 34 N. W. 104, 3 Am. S. R. 262; Henry & Coatsworth Co. v. Fisherdick, 37 Neb. 207, 55 N. W. 643; Central Constr. Co. v. Highsmith, 155 Neb. 113, 50 N. W. 2d 817. This court further said: "The lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building."

In the case of Way v. Cameron, *supra,* foreclosure was brought to enforce a lien of a subcontractor. The lien which was filed stated that the work, labor, and materials had been performed and furnished under a contract with the owner. The court said, quoting from Garlichs v. Donnelly, *supra:* " 'It is not necessary to the sworn statement and claim of lien required to be filed by subcontractors that there should be attached thereto a copy of the written contract under the terms of which the rights of such subcontractor have accrued; neither is it necessary that the ownership of the property benefited should be set forth therein.' The recital in the notice of lien, that the materials furnished were 'for the said O. D. Helming under a contract,' was an unnecessary recital and should be treated as mere surplusage." Quoting from Marrener v. Paxton, 17 Neb. 634, 24 N. W. 209, the court said: " 'The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building. The furnishing of the material is notice to the owner of the rights of the party, and until the time for filing a lien has expired, he is directly liable to such party for the value of the same.' "

From the foregoing authorities it appears that the right of the plaintiff to a mechanic's lien arises from

the furnishing of work, labor, and materials. Neither the plaintiff's petition nor the amended petition was required to make any allegation with reference to any contract with the owner. The original petition sets forth the furnishing by the plaintiff of work, labor, and materials itemized in an exhibit. The plaintiff's amended petition alleged the furnishing of the same identical items of work, labor, and materials as set forth in the original petition, to the same property, in the same amounts, and in the same periods of time. The plaintiff's cause of action, as stated in the original petition, was to recover by way of a mechanic's lien for work, labor, and materials used in the construction of the defendants' residence. As we view the amended petition, the plaintiff preserved the identity of the cause of action wherein he sought foreclosure of the mechanic's lien upon the same property for the same items he claims he furnished to be used in the construction and erection of the defendants' residence.

We conclude that, in the light of the above-cited authorities relating to mechanics' liens, the trial court erred in rendering judgment that the plaintiff's amended petition stated a separate and distinct cause of action than that set forth in the plaintiff's original petition.

The trial court did not pass upon the merits of the case. This case is for trial de novo in this court.

The plaintiff claims one of the questions involved is whether or not the positive testimony of an employee who performed the work, and the original records of the employees showing performance of the work, is overcome by negative testimony of the owner of the premises and the owner's employee to the effect that they did not see the plaintiff's workman on the premises.

In support of this the plaintiff cites 32 C. J. S., Evidence, § 1037, p. 1084. The plaintiff cites the rule in part. We summarize the rule as it appears in the citation. "Other things, such as opportunity to observe

and credibility of witnesses, being equal, greater weight should be given to positive than to negative evidence, even though the number of negative witnesses is larger; but if it appears that the attention of a negative witness was specially directed to the matter, or that he would, in the ordinary course of events, have observed the fact had it occurred, his testimony may be entitled to as much weight as opposing positive evidence, or even more."

This court in In re Estate of Woodward, 147 Neb. 270, 23 N. W. 2d 75, discussed the rule above stated. It was argued that the testimony of witnesses to a positive fact is stronger and may outweigh even a greater amount of negative testimony given by other witnesses. This court said: "Evidence is positive in character where the witness states that a certain thing did or did not happen to exist, and negative in character where the witness states that he did not see or know of the happening or existence of a circumstance or fact. 31 C. J. S., Evidence, § 2, p. 506."

In any event, the weight of the evidence is for the trier of fact to determine to arrive at a decision. The plaintiff is charged with the burden of proving his case by a preponderance of the evidence.

For convenience we will refer to Keith Muenchau as plaintiff; to Wayne Swarts as defendant or by his name; to Wayne Swarts and his wife as defendants; to William V. North as North or contractor; and to Lawrence Smith as Larry Smith.

We summarize the relevant and material evidence as follows.

The plaintiff testified that he was engaged in the plumbing, heating, well drilling, and appliance business at Eagle, Nebraska, and that he did work for contractors. In 1955, he had a crew of men working for him. He was acquainted with North and the defendant. He and his employees furnished the plumbing and heating work, equipment, and supplies for the defendants'

residence being constructed in Ashland. North was the contractor for the construction of the defendants' dwelling house, and the plaintiff was doing the work for North, that is, he furnished the fixtures for the plumbing, such as the kitchen sink, bathtub, water heater, furnace, all pipes and duct work, in fact all material that went into the installation of the heating and plumbing in the house. This was the only job he had in Ashland.

The plaintiff identified exhibit 1, his book of permanent records, containing the amount of labor performed by him and by his employees during the fall of 1955. The plaintiff testified that the entries contained in this book were in his own handwriting and were made about the time of the dates shown therein. The entries were based on information the plaintiff received from his employees and from his own observation. This book indicated that on August 25, 1955, Larry Smith and Warren Lashley, plaintiff's employees, worked 7 hours in connection with the plumbing and heating required in the defendants' residence in Ashland. This exhibit shows the dates, the number of hours, and the names of the employees of the plaintiff who worked on the defendants' house in Ashland. We deem it unnecessary to set forth this evidence in full. It appears from the exhibit that the last item shown therein was on December 8, 1955, when Larry Smith worked 3 hours on the defendants' house in Ashland with reference to the plumbing and heating thereof.

There was also received in evidence an exhibit identified as pricing sheets made under the direction of the plaintiff, showing the list prices of the materials used on the defendants' residence. It appears that this pricing of materials was made as of the date of November 23, 1955.

Another exhibit was received in evidence which is the lien filed by the plaintiff with the register of deeds of Saunders County, and the exhibit constituting the

pricing sheets was attached to the lien. This mechanic's lien was filed January 31, 1956.

The plaintiff further testified that on Sunday following December 8, 1955, he and the defendant went to the defendants' house in Ashland to check the inventory list, which they both did, and visually counted the material on the premises. The plaintiff further testified that the prices charged for materials and labor were fair and reasonable.

On cross-examination the plaintiff testified that the contract he had with North was an oral contract; that he had no contract, either oral or written, with Wayne Swarts; that he guessed Larry Smith put the registers in the defendants' house on December 8, 1955; that he did not know when the registers were delivered; that some of them could have been delivered in November, however they were installed on December 8, 1955; and that he knew Larry Smith did this work because Larry Smith told him he did so. This witness further testified that generally the registers are the last thing to be installed in a house after the painting is finished; and that it would have been irregular if the registers had been installed in November 1955. With reference to some work that was done at the defendants' house on December 6, 1955, that work was probably with reference to the sump pump. The plaintiff further testified that he was aware that there was extra work that had to be done which was not finished on December 6, 1955; that such work would be the placing of hangers on duct work, work on the sump pump, and a valve that had to be installed; that this work would be in the basement; that he did not know why this work was not done prior to December 6, 1955; that it possibly could have been done before that date; and that this plumbing could have been done as early as November 23, 1955. This witness further testified that he had tried to contact North when he heard that North was about to take bankruptcy; and that he did not remember anyone

asking him to go to the defendants' house on December 8, 1955, or to furnish any material or labor on that date.

Larry Smith testified that he worked for the plaintiff in the fall of 1955; that he helped the plaintiff in the furnishing of materials, plumbing, and heating work that might be required on the defendants' job at Ashland; that he worked at the defendants' house as did other employees of the plaintiff; and that each employee kept his own individual book, and such employee would write down what work he had done that day or, in the alternative, the employees would probably see the plaintiff and tell him what they had done that day with reference to the work on defendants' house, or any other work. This witness further testified that he had seen the plaintiff's book of original entries which showed the record of the various dates and jobs upon which the employees were working and also the recorded information obtained by the plaintiff from this witness; that he worked on defendants' house in December 1955; that he could not remember the actual dates, but that he did put in the registers which was the final work to be done insofar as the work of the plaintiff and his employees were concerned; and that the registers were not installed earlier because there was painting that had to be done and it was not desirable to get things "messed up." This witness further testified that he imagined that he put hangers on the duct work, and also did some work on the sump pump, in fact, a foot valve was placed on it. He identified a check dated December 15, 1955, payable to him in the amount of $98.48, signed by Eleanore Muenchau, wife of the plaintiff, who customarily wrote the checks, for work that he did in December at the defendants' property.

On cross-examination this witness testified that it would not be necessary that a request be made to complete a job that had to be done, because the type of work to be performed by the plaintiff and his employees would by necessity have to be done at different times;

that the work he did at the defendants' house on December 8, 1955, took 3 hours; that he did not remember the time of day, but testified that it was probably in the morning, and no one else was around the house at that time; that on December 6, 1955, the hangers had to be hung and there was work to be done on the sump pump as it had to be hooked up with the sewer line; that the duct work would run almost the full length of the house, and when this was put up it was necessary to put hangers on it, but it might get out of line and require additional hangers; that he was unable to tell the number of hours he worked on December 6, 1955, at defendants' house; and that he got into the house on December 8, 1955, as he knew where the key was left for that purpose.

North testified that he was a contractor engaged on the building project of the defendants; that he employed the plaintiff to furnish all materials and supply the labor necessary for the plumbing and heating to be done at the defendants' house; and that the plaintiff and his employees did the work and furnished all the materials necessary to be installed, installed the same, and also did all the work relating to the heating requirements for the defendants' house. On cross-examination North testified that the plaintiff started to furnish the materials or to deliver the same on the job with the necessary labor in August 1955. This witness was unable to testify as to the final day any work was done on the defendants' house by the plaintiff or his employees. This witness further testified that he ceased to work on the job the day before Thanksgiving Day in 1955; that he was unable to testify whether the plumbing was completed or not at that time; that the heating was installed to the point that there was heat in the house; and that he terminated the job because he was contemplating taking bankruptcy.

An attorney who was appointed trustee in bankruptcy in the North bankruptcy proceedings on December 20, 1955, testified that he knew the plaintiff and had a con-

versation with him relative to some work done for the defendants at Ashland; that this conversation took place in the trustee's office with the plaintiff and the trustee being the only persons present; that this conversation occurred between Christmas and the end of the year 1955; that the plaintiff said he had done some work for North; and that the plaintiff attended the first meeting of the creditors in Omaha at the time the trustee was appointed. With reference to the conversation had with the plaintiff, this witness testified that the plaintiff mentioned two places that he had done some work for North, and this witness remembered especially the defendants' job at Ashland, and one at Waverly. The plaintiff told this witness the amounts due him and wondered what he should do. This witness told the plaintiff that he could file a proof of claim in the bankruptcy proceedings; and that if he did file a proof of claim he would not be paid in full because the assets in bankruptcy are almost never sufficient. This witness further testified that he questioned the plaintiff as to the time of the completion of the job and the plaintiff told him that while he did not remember the exact date, that he had completed the defendants' job in the latter part of November 1955.

North testified in behalf of the defendants that he had an oral agreement with the defendant with regard to constructing a dwelling house for him in Ashland; that the amount agreed on for this construction work was $10,000; and that construction started about the middle of August 1955, and ceased about November 20, 1955. After November 20, 1955, this witness left the state. This could have been on November 26, 1955. He went to Brookfield, Missouri, where he stayed approximately a week. While he was in Brookfield, Missouri, the plaintiff called this witness by telephone. During the conversation the plaintiff was quite curious and asked this witness what had happened, to which this witness

replied that he was "out of business"; and that he had terminated his business.

A witness called for the defendants testified that he was employed as a painter by North relative to the construction of defendants' house at Ashland in the latter part of 1955, and worked up until North quit business; that after that time he worked for Wayne Swarts to finish painting the house; that they finished the floors and finished painting and varnishing; that Bill McDonald assisted him; and that two other persons were at work sanding the floors during the time this witness worked there. This witness further testified that he started to work for Wayne Swarts on December 5, 1955. On that day he worked 8 hours; on December 6, he worked 8 hours; on December 7, 8 hours; on December 8, 7 hours; on December 9, 6 hours; on December 10, 6 hours; on December 12, 6 hours; and on December 17, 6 hours. He did not recall anyone from any plumbing company coming to the house and doing any plumbing work while he was there. He did not think that he saw Larry Smith there on December 6, 1955. He did not see Larry Smith there on December 8, 1955, nor did he see the plaintiff there at the house on December 6 or 8, 1955.

On cross-examination this witness testified that he was certain that Larry Smith was not at the defendants' house when he was there; and that the paint was kept in the kitchen and the painters went back and forth for the paint. On redirect examination this witness testified that the house consisted of five or six rooms.

Wayne Swarts testified that he had an agreement with North with reference to the construction of the house at Ashland, and had no business transactions with the plaintiff; that North started construction of the house about August 20, 1955, and worked at the house until a day or two before Thanksgiving Day in 1955; that when North quit working the construction was finished except for the painting, varnishing, sanding,

and polishing of the floors, the concrete work outside the house, and other matters relating to work that had to be done outside the house; that the plumbing and heating were all finished; and that they had used the heat and water all the time they were there when it was necessary. He was there while the workmen were painting, and was at the house at different times from the 5th to the 10th of December. He believed that he put in 6 or 8 hours a day working at the house. He did not see Larry Smith there on December 6 or December 8, 1955. He did not request the plaintiff to come to the house on December 8, 1955. The plaintiff came to his house either the latter part of November or the first part of December 1955, at night, and that was his first acquaintance with the plaintiff. They visited for a while in the car. In the conversation had with the plaintiff, the plaintiff told this witness that he did not intend to file a lien, but said he would like to see what the boys had put in the house and asked if this witness would go with him. They went to the house and into the basement where, this witness said, they remained for 3 or 5 minutes, then left. This witness further testified that he did not see the plaintiff again.

The plaintiff testified in rebuttal on his direct examination that in his conversation with the trustee in bankruptcy, which occurred sometime in December 1955, he did not talk to such trustee about the Swarts job. On cross-examination the plaintiff testified that he told the trustee in bankruptcy that the Swarts job was one job on which he would file a lien.

In Gatchell v. Henderson, 156 Neb. 1, 54 N. W. 2d 227, the court said: "A subcontractor must file a sworn statement of the amount due him from the contractor within sixty days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien under the provisions of section 52-102, R. S. 1943." See, also, Parsons Constr. Co. v. Gifford, 129 Neb. 617, 262 N. W. 508.

We conclude from the evidence that the plaintiff failed to prove his case by a preponderance of the evidence, and failed to file his subcontractor's lien within 60 days from the date of furnishing the last item of material or labor. The evidence does not support the plaintiff's contention that he met the requirements of section 52-102, R. S. Supp., 1955.

"A judgment will not be reversed for errors against a party not entitled to succeed in any event." Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623. See, also, Borsen v. Moskowitz, 163 Neb. 223, 79 N. W. 2d 178.

For the reasons herein given, the judgment of the district court should be affirmed.

AFFIRMED.

IN RE APPLICATION OF AINSWORTH IRRIGATION DISTRICT. AINSWORTH IRRIGATION DISTRICT, APPELLEE, V. HAROLD HARMS ET AL., APPELLANTS.
102 N. W. 2d 429

Filed April 8, 1960. No. 34616.

Waters. The Department of Water Resources has exclusive original jurisdiction to hear and adjudicate all matters pertaining to water rights, appropriations, and priorities for the use of public waters of this state for irrigation.

APPEAL from the district court for Brown County: LYLE E. JACKSON, JUDGE. *Affirmed.*

Quigley & Quigley and *Mason, Knudsen, Dickeson & Berkheimer,* for appellants.

William C. Smith, Jr., Bert L. Overcash, and *Woods, Aitken & Aitken,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

On September 25, 1958, plaintiff, Ainsworth Irrigation District, filed a petition in the district court for

Brown County, seeking approval and confirmation of its organization as an irrigation district, and approval and confirmation of its contract with the United States for construction of the Ainsworth unit of the Missouri River Basin project, together with operation and maintenance of certain distribution and drainage works for the irrigation of lands within the district and for the delivery of water from such works by employment of a part of the waters of the Snake River, a tributary of the Niobrara River. The first nine paragraphs of plaintiff's petition specifically set forth at length the procedure used in organizing the district, supported by exhibits attached to and made a part of plaintiff's petition, which appear in the bill of exceptions as exhibits A through I. Paragraph 10 of plaintiff's petition set forth at length the time, mode, and manner of executing its contract with the United States, together with its material terms and contents. Also, a copy of such contract, exhibit J, which appears in the bill of exceptions as exhibit 3, was attached to and made a part of plaintiff's petition.

Plaintiff prayed for the fixing of a time for hearing on its petition; the giving of notice, as required by law; and that upon such hearing, an order be rendered approving and confirming the organization of the district, approving and confirming the proceedings of plaintiff's board of directors leading up to and including the making of its contract with the United States, and approving and confirming the validity of its terms and the execution thereof.

Certain motions were filed by the parties and were overruled, but as we view it, the substance thereof is unimportant to ultimate decision herein.

Be that as it may, nine named defendants answered plaintiff's petition, admitting the allegations of fact contained in the first nine paragraphs of plaintiff's petition whereby they admitted that plaintiff had taken all of the procedural steps required by law to organize as

an irrigation district. Defendants' answer denied the allegations of fact set forth in paragraph 10 of plaintiff's petition, but admitted that plaintiff district, by its president and secretary, executed plaintiff's contract with the United States, a copy of which was identified as exhibit J by plaintiff's petition. Defendants then respectively set forth the description and location of lands owned by and in the possession of each of them and substantially alleged in paragraphs 6, 7, 8, 9, 10, 12, and 13 that the water intended to be appropriated for use by plaintiff would be diverted and appropriated from the Snake River and would not be returned thereto or to the Missouri River, contrary to and in derogation of the statutes, laws, and public policy of this state. Defendants also alleged that plaintiff's petition did not state a cause of action, and prayed for denial of the relief sought by plaintiff and a dismissal of plaintiff's petition. In that connection, this is a proper place to say that plaintiff's petition did state a cause of action under the provisions of sections 46-1,151 and 46-1,152, R. R. S. 1943, and other related sections hereinafter mentioned.

Plaintiff then filed a motion in the alternative to strike defendants' entire answer, or to strike paragraphs 6, 7, 8, 9, 10, 12, and 13 therefrom, upon the ground that the allegations therein were not a defense to plaintiff's action because the Department of Water Resources had exclusive original jurisdiction over all matters pertaining to water rights and the appropriation of water in such cases; that such defense was redundant and irrelevant to the object of plaintiff's action; and that paragraph 6 of plaintiff's contract with the United States specifically provided that: " 'The right to the beneficial use of the District water supply shall be governed by the Federal Reclamation Laws and the laws of the State of Nebraska, as the same may at any time apply to this contract; * * *.' " In that connection, the trial court overruled plaintiff's motion to strike defendants'

entire answer, but sustained plaintiff's motion to strike paragraphs 6, 7, 8, 9, 10, 12, and 13 from defendants' answer. Plaintiff's reply was a general denial.

Thereafter, a hearing was held upon the merits, and a judgment was rendered which approved and confirmed the organization of plaintiff as an irrigation district and approved and confirmed plaintiff's contract with the United States as prayed by plaintiff. Defendants' motion for new trial was overruled, and they appealed, assigning, as far as important here, that the trial court erred in striking the aforesaid paragraphs from their answer, and in excluding evidence by overruling defendants' offer to prove the facts alleged therein. We do not sustain defendants' assignment.

Defendants admit, and the record establishes as well, that plaintiff district was legally formed and organized by taking every procedural step required by law, and that plaintiff's contract with the United States was duly executed by the parties in every respect as required by law. In that connection, as stated in the record by defendants' counsel during the trial: "We are not making any objection to the interpretation of the language, or the various items in the contract, or the particular wording in this contract, Exhibit 3; our contention is that the entire Exhibit 3 is void and cannot be confirmed by the Court, because of its illegal nature," because it intends to appropriate and employ a "diversion of water from the Snake River into the canal for use in this district." Defendants' counsel further stated: "* * * we have admitted the proceedings that go to make up the district; but the district is illegally formed because it was formed for an unlawful and void purpose." Defendants agreed with the trial court that: "As far as these defendants are concerned" the whole issue was "the right of this district to divert this water over these various water sheds," as named and claimed by defendants.

Thus, the sole question presented in this case, as we

view it, is whether or not the trial court had original jurisdiction to hear and adjudicate the issue of plaintiff's water rights and its right to an appropriation and employment of water for irrigation purposes from the Snake River. We conclude that the trial court did not have such jurisdiction, but that the Department of Water Resources had exclusive original jurisdiction, acting as a quasi-judicial body, to hear, determine, and adjudicate plaintiff's water rights for irrigation and its appropriation rights and priorities, if any.

This action is a special proceeding in rem in the district court, as authorized by sections 46-1,151 and 46-1,152, R. R. S. 1943, and other related sections, 46-1,102 and 46-1,106, R. R. S. 1943. In that connection, section 46-1,151, R. R. S. 1943, authorizes the "board of directors of any irrigation district heretofore or hereafter organized" and "before or after the making of any contract with the United States or others," to "commence a special proceeding in the district court of the state, in and by which the proceedings of such board and of such district leading up to or including the making of any such contract, and the validity of any of the terms thereof * * * or the taking of any particular steps or action, shall be judicially examined, approved and confirmed, or disapproved and disaffirmed."

Section 46-1,152, R. R. S. 1943, provides the practice and procedure for such judicial determination, and recites that: "The court may approve and confirm such proceedings in part and disapprove and declare illegal or invalid other and subsequent parts of the proceedings, and insofar as possible the court shall remedy and cure all defects in such proceedings."

The trial court herein approved and confirmed plaintiff's contract with the United States, but ruled in effect during the course of the proceedings that plaintiff's right to an appropriation, and use of water by plaintiff for irrigation purposes, and the issue of defend-

ants' claimed unlawful diversion of water for irrigation from the Snake River, was within the exclusive original jurisdiction of the Department of Water Resources. In that connection, such department was created by section 81-101, R. R. S. 1943. Section 46-705, R. S. Supp., 1959, effective September 20, 1957, transferred to such department all powers and duties with regard to water rights for irrigation theretofore imposed by law upon the Department of Roads and Irrigation.

In such respect, section 46-209, R. S. Supp., 1959, effective September 20, 1957, provides in part: "The Department of Water Resources is given jurisdiction over all matters pertaining to water rights for irrigation, power or other useful purposes, and drainage, except as such jurisdiction is specifically limited by statute. Such department shall adopt rules governing matters coming before it. It may refuse to allow any water to be used by claimants until their rights have been determined and made of record. It may request information relative to irrigation * * * from any and all * * * irrigation * * * officers and from any other person or persons. It shall have public hearings on complaints, petitions, or applications in connection with any of the above matters. Such hearings may be had at the time and place designated by the department. The department shall have power to certify to official acts, compel attendance of witnesses, take testimony by deposition as in suits at law, to examine books, papers, documents, and records of any * * * party, or parties interested in any of the matters hereinbefore mentioned, or have such examinations made by its qualified representative, and shall make and preserve a true and complete transcript of its proceedings and hearings. Upon any hearing, the department shall receive any evidence relevant to the matter under investigation and the burden of proof shall be upon the person making the complaint, petition, and application. After such hearing and investigation, the department shall render a de-

cision in the premises in writing and shall issue such order or orders duly certified as it may deem necessary." In that connection, and contrary to defendants' contention, we are cited no statute or authority, and we have found none, which limited the exclusive original jurisdiction of the Department of Water Resources with relation to plaintiff's water rights and appropriation in the case at bar.

Section 46-210, R. R. S. 1943, provides for an appeal from final orders so rendered by the Department of Water Resources directly to this court. In Cozad Ditch Co. v. Central Nebraska Public Power & Irr. Dist., 132 Neb. 547, 272 N. W. 560, citing authorities, this court said: "The existence of a final order (made and rendered by the Department of Roads and Irrigation, now the Department of Water Resources) is essential and a prerequisite to review in this court."

Defendants relied upon Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N. W. 334, to support their contention that the trial court had original jurisdiction to determine plaintiff's water rights and appropriation therefor, together with defendant's alleged issue of diversion. That opinion is entirely distinguishable, and, as a matter of fact, the very first paragraph thereof obliterates defendants' contention wherein it is pointed out: "This is an appeal to this court in a special statutory proceeding before the department of roads and irrigation" wherein "The final orders entered by that department" were "here sought to be reviewed * * *." Also, in a second appearance of Osterman v. Central Nebraska Public Power & Irr. Dist., 133 Neb. 606, 276 N. W. 398, this court said: "The litigation was instituted by proceedings before that public tribunal, the forum of original jurisdiction."

As early as Castle Rock Irrigation Canal & Water Power Co. v. Jurisch, 67 Neb. 377, 93 N. W. 690, this court said: "Thus the control of the waters of the state is provided for, and a state board established with ex-

clusive original jurisdiction to apportion the waters of the state to the citizens thereof for beneficial purposes." That opinion also held that an applicant for the appropriation of waters of the state for irrigation, cannot prosecute the work and condemn a right-of-way for that purpose until he has a permit from the State Board of Irrigation to divert the water of the state to specific lands described in his application.

In Kirk v. State Board of Irrigation, 90 Neb. 627, 134 N. W. 167, this court held: "In this state, the water of running streams is publici juris; its beneficial use belongs to the public and is controlled by the state in its sovereign capacity."

In Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N. W. 2d 415, a special proceeding comparable with that at bar, this court held: "By statute, the board of directors of any irrigation district heretofore or hereafter organized may, in its discretion, before or after making any contract with the United States of America, or the taking of any particular steps or action, commence a special proceeding in the district court of the state, in and by which the proceedings of such board and of such district leading up to or including the making of any such contract, and the validity of the terms thereof, or the taking of any particular steps or action, shall be judicially examined, approved, and confirmed, or disapproved and disaffirmed.

"By statute, the United States of America and every person intending to appropriate any of the public waters of the state shall, before commencing the construction, enlargement, or extension of any works for such purpose, performing any work in connection with the same, or taking any water from any constructed works, make application to the Department of Roads and Irrigation for a permit to make such appropriation."

As said in In re Claim Affidavit of Parsons, 148 Neb. 239, 27 N. W. 2d 190, citing authorities: "It is well settled by the decisions of this court that the Department

of Roads and Irrigation has jurisdiction to hear, determine, and make adjudication upon irrigation appropriation rights and priorities, and in the absence of an appeal as provided by law, the orders made in a proper proceeding in reference thereto are final and binding upon the parties." This and other courts have so concluded in other cases too numerous to cite.

As recently as North Loup River Public Power & Irr. Dist. v. Loup River Public Power Dist., 162 Neb. 22, 74 N. W. 2d 863, we said: "It is clearly recognized that the department has authority, granted by statute, to adjudicate water rights in this state. It is invested with certain quasi judicial powers which have application only to the granting and cancellation of appropriation rights and priorities. State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239; Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N. W. 2d 240. The approval of an application for an appropriation of public waters under section 46-235, R. R. S. 1943, is an exercise of the quasi judicial powers of the department. It will be noted that under the foregoing section of the statute the department, upon examination of the application, may endorse its approval 'for a less period of time for perfecting the proposed appropriation, or for a less amount of water, or for a less amount of land than applied for.' An aggrieved applicant is given an opportunity to be heard by the department, and the further right to appeal to this court from an adverse decision. In Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., supra, we said: 'Under the provisions of section 81-6317, Comp. St. 1929, the department may approve the application for an appropriation of public waters in an amount less than that applied for. If the applicant be dissatisfied, the remedy is by appeal to the supreme court, and if he fails to appeal, the appropriation as made is final.' Otherwise stated, unless an appeal is taken from the adverse order of the depart-

ment, the decision of the department is final and the issues finally adjudicated."

In that connection, section 46-226, R. R. S. 1943, provides that: "The Department of Roads and Irrigation (now the Department of Water Resources) shall make proper arrangements for the determination of priorities of right to use the public waters of the state, and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the department."

Also, section 46-233, R. S. Supp., 1959, effective September 20, 1957, provides that: "(1) The United States of America and every person hereafter intending to appropriate any of the public waters of the State of Nebraska shall before (a) commencing the construction, enlargement, or extension of any works for such purpose, (b) performing any work in connection with the same, or (c) taking any water from any constructed works, make an application to the Department of Water Resources for a permit to make such appropriation * * *. (3) Upon receipt of the application required by the provisions of subsection (1) of this section and containing the information set forth in subsection (2) of this section, the department shall (a) make a record of the receipt of such application, (b) cause the same to be recorded in its office, and (c) make a careful examination of the application to ascertain whether it sets forth all the facts necessary to enable the department to determine the nature and amount of the proposed appropriation."

Further, section 46-238, R. S. Supp., 1959, effective September 20, 1957, provides for the time within which the construction of irrigation works shall commence after approval of the application for water for irrigation purposes by the Department of Water Resources has been obtained. Such section also provides: "Any application for an appropriative right which is deficient by reason of past failure to comply with any of the

requirements of sections 46-233 and 46-238 for the perfection of an appropriative right, which application has not been dismissed or denied, is also hereby ratified and confirmed; unless, within one year from September 20, 1957, a petition to vacate such an order granting an extension of time, or a petition to forfeit, cancel or otherwise invalidate such an application for an appropriative right, shall have been filed with the department by a person affected adversely thereby."

Thus, although the organization of plaintiff district, and its contract with the United States have been approved and confirmed by the district court as authorized by statutes heretofore cited, plaintiff still has no water rights or authority to appropriate or use any water for irrigation, or to prosecute the work in connection therewith until the Department of Water Resources has adjudicated such rights. In other words, the approval and confirmation of plaintiff's organization as an irrigation district and its contract with the United States could neither give nor deprive plaintiff of any water rights or appropriation of water for irrigation purposes because the Department of Water Resources had exclusive original jurisdiction of such matters. In that connection, the defense pleaded in paragraphs 6, 7, 8, 9, 10, 12, and 13, which were stricken from defendants' answer, was entirely redundant and irrelevant to the object of the special proceedings at bar. Such paragraphs were properly stricken, and if any evidence was offered by defendants in support thereof, it was properly refused admission.

In this case, the Department of Water Resources had exclusive original jurisdiction "over all matters pertaining to water rights for irrigation," which included plaintiff's right to water for irrigation and an appropriation therefor, together with the issue of diversion claimed by defendants. As a matter of fact, such issues were ultimately presented and finally determined by special proceedings before the Department of Water Resources,

and defendants have appealed therefrom in case No. 34747, decided this day. Ainsworth Irr. Dist. v. Bejot, *post*, p. 257, 102 N. W. 2d 416.

For reasons heretofore stated, we conclude that the judgment rendered herein should be and hereby is affirmed. All costs are taxed to defendants.

AFFIRMED.

LLOYD W. SLEEZER, APPELLEE, V. ALICE M. LANG, SPECIAL ADMINISTRATRIX OF THE ESTATE OF CARL LANG, DECEASED, APPELLANT, IMPLEADED WITH BI-STATE DISTRIBUTING CORPORATION, A CORPORATION, APPELLEE.

102 N. W. 2d 435

Filed April 8, 1960. No. 34697.

1. **New Trial.** The purpose of a new trial is to enable the trial court to correct errors that have occurred in the conduct of the trial.
2. ———. A new trial may be granted only for legal cause or reason and where it appears that a legal right has been invaded or denied. If legal cause or reason exists and the complaining party makes his application in writing within the time fixed by statute, the trial court has no discretion, and motion for new trial must be sustained. Otherwise it must be overruled.
3. **Carriers.** A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care.
4. **Appeal and Error.** A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here.
5. **Pleading.** It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense. In such case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just.
6. **Appeal and Error.** Except where jurisdiction is involved, this

court will consider on appeal only questions which have been presented to and passed upon by the trial court.

7. **Pleading.** If plaintiff's petition is prepared, signed, and verified by his attorney, and by mistake an erroneous statement is included therein, the court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation.
8. ———. A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence. An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues.
9. ———. A pleading which has been superseded by an amended pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence in order to be considered. The rule that a party may at any and all times invoke the language of his opponent's pleading as rendering facts therein alleged indisputable applies only to statements in the pleadings upon which the case is tried.
10. **Pleading: Trial.** It is within the discretion of the trial court to permit or refuse an amendment of a pleading during the trial of a case, and error cannot be predicated on the action of the court in reference thereto unless an abuse of discretion is established to the prejudice of the party who is adversely affected thereby.
11. **Negligence.** A violation of the provision of a federal statute, or any rule or regulation promulgated thereunder, regulating the use and operation of airplaines in flight which are intended to safeguard travelers therein is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
12. **Evidence.** Impeaching evidence is that which is directed to the question of the credibility of the witness.

APPEAL from the district court for Douglas County: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Gross, Welch, Vinardi & Kauffman, for appellant.

James J. Fitzgerald and *Robert E. O'Connor*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Douglas County. It involves an action brought by Lloyd W. Sleezer against Carl Lang, doing business as Lang Flying Service, to recover damages for personal injuries suffered in an airplane accident which accident, plaintiff alleges, was caused by acts of negligence on the part of Lang and of the pilot thereof, who was an employee of Lang, while the latter was operating it in flight with plaintiff as a passenger therein.

Bi-State Distributing Corporation, plaintiff's employer, was also made a party defendant because of certain subrogation rights it would have in and to any recovery made by plaintiff by reason of payments it had and would make to and for plaintiff under and by reason of the Nebraska workmen's compensation statutes. Its rights are not material to any issue raised by this appeal and therefore they will not be discussed.

Trial was had to a jury and on December 3, 1954, a verdict was returned by it for defendant Carl Lang. Judgment was entered thereon. Thereafter, on December 10, 1954, plaintiff filed a motion for an order vacating the verdict and judgment entered thereon, and for new trial. This motion was not ruled on by the trial court until June 17, 1959, some 4 years, 6 months, and 7 days after it had been filed, when it was sustained. Thereafter, on July 10, 1959, it was suggested to the trial court that defendant Carl Lang had died on June 26, 1959. On July 13, 1959, the action was revived in the name of Alice M. Lang as special administratrix of the estate of Carl Lang, deceased, she being substituted as defendant in his place. On July 14, 1959, the special administratrix took this appeal from the order granting plaintiff a new trial. The appeal from such an order is authorized by section 25-1315.03, R. R. S. 1943.

"The purpose of a new trial is to enable the court to correct errors that have occurred in the conduct of the trial." Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709. See, also, Pongruber v. Patrick, 157 Neb. 799, 61 N. W. 2d 578; Owen, Administrator v. Moore, 166 Neb. 226, 88 N. W. 2d 759.

The trial court gave no reason for its granting a new trial. In view thereof, the following applies: "If the trial court gave no reasons for its decision in sustaining the motion for new trial, then the appellant meets the duty placed upon him when he brings the record here with his assignments of error and submits the record to critical examination with the contention that there was no prejudicial error. The duty then rests upon the appellee to point out the prejudicial error that he contends exists in the record and which he contends justifies the decision of the trial court. The appellant then in reply has the right, if he desires, of meeting those contentions." Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571. See, also, Hert v. City Beverage Co., Inc., 167 Neb. 557, 94 N. W. 2d 27; Gain v. Drennen, 160 Neb. 263, 69 N. W. 2d 916; Sautter v. Poss, 155 Neb. 62, 50 N. W. 2d 547. As stated in Sautter v. Poss, *supra*: "There is no burden in the sense of a burden of proof upon either party. The burden is upon both parties to assist the court to a correct determination of the question or questions presented." This the parties have endeavored to do.

In respect to the granting or denying of a motion for a new trial we said in In re Estate of Kinsey, 152 Neb. 95, 40 N. W. 2d 526: "The district court has the power and is required to consider and determine motions for new trial by the exercise of its judicial discretion, which means the application of statutes and legal principles to the whole record then before it. A new trial may be granted only for legal cause or reason and where it appears that a legal right has been invaded or denied. If legal cause or reason exists and the complaining party

makes his application in writing within the time fixed by statute, the trial court has no discretion, and motion for new trial must be sustained. Otherwise it must be overruled, because where a party has sustained the burden and expense of a trial and has succeeded in securing the verdict of a jury on the facts in issue, he has a right to keep the benefit of that verdict and judgment thereon unless there is prejudicial error in the proceedings by which it was secured." See, also, Owen, Administrator v. Moore, *supra;* Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557; Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372; Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660.

Appellee Lloyd W. Sleezer, plaintiff below, was at all times herein material general manager of Bi-State Distributing Corporation of which Harry Sidles was then president. Bi-State Distributing Corporation, to which we shall hereinafter refer as Bi-State, was then engaged in distributing appliances, including Bendix. Bi-State had been invited to send representatives to a national sales meeting of Bendix to be held at South Bend, Indiana, on Thursday, September 18, 1952. Sidles called Carl Lang, to whom we shall hereinafter refer as either Lang or defendant, to charter a plane for the trip and did so a few days before September 17, 1952, arranging with Lang to leave on the afternoon of Wednesday, September 17, 1952, and return sometime during the day of Thursday, September 18, 1952. Lang was licensed to operate a private airplane taxi service and chartered planes for that purpose. He was not operating a regular scheduled plane service. His headquarters were at the Omaha Municipal Airport where he operated under the name of Lang Flying Service. Sidles, appellee, and R. J. Harrison, the latter being the general sales manager of Bi-State, planned to make the trip. They reported to Lang's headquarters at the Omaha Municipal Airport shortly before 3 p. m., on September 17, 1952, ready to take the chartered plane

to South Bend. Lang had furnished a single engine Beechcraft Bonanza for the trip and Ray Vequist as pilot. Ray Vequist, to whom we shall hereinafter refer as either Vequist or the pilot, was a licensed pilot who, at the time, was working for Lang. The Beechcraft Bonanza is built to carry four people, a pilot and three passengers. The plane, with all parties and their baggage aboard, left Omaha at 3 p.m., and arrived at South Bend at 6 p.m., or shortly thereafter. The trip was uneventful.

On the return trip on September 18, 1952, the plane left South Bend at 6:07 p.m., and the trip was again uneventful until after the plane had passed over Des Moines, Iowa, and headed for Omaha, Nebraska. For reasons, which will hereinafter be set out, the plane attempted an emergency landing at an airfield located at Atlantic, Iowa. In making such landing the plane missed the runway, landed in a field of soybeans, and nosed over on its top. It is because of personal injuries, which appellee claims he received as a result of the accident, that he here seeks to recover damages.

We said in Scarborough v. Aeroservice, Inc., 155 Neb. 749, 53 N. W. 2d 902, 30 A. L. R. 2d 1159: "A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract, and such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care." The evidence conclusively establishes that Lang was within the class to which the foregoing applies.

Appellant contends there was not sufficient evidence of negligence in this case to justify the court's submitting it to a jury, that is, that defendant was entitled to a directed verdict. The only charge of negligence submitted by the trial court "* * * is the claim that the pilot failed to refuel en route when he had ample opportunity and time to do so and thus permitted the plane to run out of gas."

On cross-examination Lang, while testifying in his own behalf, was asked the following question: "Specifically, there weren't any flares aboard this ship, were there?" Without objection being made he answered as follows: "No, no flares." In this situation the following has application: "A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error here." Lund v. Holbrook, 153 Neb. 706, 46 N. W. 2d 130.

The admission of this specific evidence, as such, is not assigned as error by appellant. However, appellant does contend that all evidence as to flares given on cross-examination by defendant, over objection, was erroneously admitted by the trial court and fully discusses that contention in her brief. However, such contention cannot be properly made to this specific evidence here for no objection was made thereto at the time it was received nor was any motion made to strike it at that time.

"Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." Mundy v. Davis, 154 Neb. 423, 48 N. W. 2d 394. It is of course true that negligence cannot be inferred merely because an accident happened. Laurinat v. Giery, 157 Neb. 681, 61 N. W. 2d 251; In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523.

"In determining the question of whether or not a motion of a defendant for a directed verdict * * * should be sustained the court is required to consider the evidence in the light most favorable to the plaintiff and to resolve every controverted fact in his favor, and he

should have the benefit of every inference that can reasonably be deduced therefrom." Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59. We shall set forth the evidence in light of the foregoing principle.

Omaha is 500 air miles from South Bend. The daylight trip to South Bend on September 17, 1952, which was nonstop, was uneventful, weather conditions being good. It took only 3 hours to make the trip, the airplane being aided by a slight tail wind.

The airplane used had two tanks for gasoline, one in each wing. Each tank had a capacity of 20 gallons. The evidence is to the effect that the airplane would ordinarily use 10 gallons of gasoline an hour while in flight regardless of whether it had head winds or tail winds, as they would only affect its ground speed. However, it appears that on the trip from Omaha to South Bend it consumed more than 10 gallons an hour for when the airplane was serviced at South Bend, immediately after it arrived there, 32.5 gallons of gasoline were put in the 2 tanks.

The airplane left South Bend for a return nonstop flight to Omaha at 6:07 p.m., on September 18, 1952. The plane was to fly over the same route taken the previous day, which included Des Moines and Atlantic, Iowa. The same pilot and passengers, together with their luggage, were aboard as on the trip to South Bend. The pilot checked both gasoline tanks at South Bend and found them to be full. The pilot's flight plan indicated he estimated it would take 3 hours and 20 minutes to reach Omaha, which would make the latter part of the trip a night flight. In fact, darkness overtook the airplane as it passed over Chicago Heights, Illinois. The airplane carried no flares. Flares carried by airplanes are of an incendiary type, being made of magnesium. They burn intensely and are used for lighting purposes.

The trip back, as far as Des Moines, was uneventful, the weather being good. It is about 385 air miles from

South Bend to Des Moines and 115 air miles from there to Omaha. The airplane passed over Des Moines about 8:42 p.m., or 2 hours and 35 minutes out of South Bend. Although they had been bucking a slight head wind the gauges in the plane showed one of the gasoline tanks to be empty but the other to be three-fourths full as they passed over Des Moines. This indicated they had about 15 gallons of gasoline left at that point. The pilot testified it is good practice to have a 30-minute reserve of gasoline to continue flight to a certain point and that the regulations covering planes in flight so require. Omaha being only 115 air miles from Des Moines, and considering the speed it had made and the gasoline it had consumed from South Bend, it would appear that the airplane then had enough gasoline to provide this time reserve as it passed over Des Moines on its way to Omaha.

The record shows that Des Moines has a modern airport with modern facilities. It has multiple concrete runways 7,500 feet long that are fully equipped with modern lighting facilities. It also has modern radio, navigational, and radar facilities. It was lighted as the plane passed over Des Moines.

Atlantic, Iowa, is between Des Moines and Omaha. It was on the pilot's planned line of flight. Between Des Moines and Atlantic, at a point just beyond the half way point, the pilot of the plane noticed the gasoline gauge was dropping faster than he thought it should, it then indicating the tank that was three-fourths full over Des Moines was only about one-fourth full. Under these conditions the pilot decided to proceed on toward Atlantic.

Vequist was at all times during the flight from Omaha to South Bend and return operating the plane as an employee of Lang and any conduct on his part while doing so, which would give appellee any basis for a cause of action herein, would be imputed to Lang.

Atlantic has an airfield with a marked but unlighted

3,600-foot sod runway, which runs east and west. The airfield did have portable lights which consisted of smudge pots. These could, when lighted, be taken out and set along the runway to mark and light it. It had an airport manager who lived near the airfield but who was not in constant attendance thereat. The pilot was familiar with this airfield and its operations as he had, on previous occasions, landed there during the daytime.

When the airplane got over Atlantic the gasoline gauges on both gasoline tanks indicated they were empty. The pilot therefore decided to make an emergency landing at the airfield located there. He turned on his landing lights, there being one under each wing of the plane. He flew over the town with his landing lights on hoping the airport manager would see the plane and put out the portable lights along the runway. This did not happen. The pilot passed over the unlighted airfield twice with the landing lights on hoping to locate the runway. He was not able to do so. On the third pass he attempted to land. As he came down to land he observed markers and thought he would land on the runway. However, he landed some 50 to 100 feet north of the runway in a field of soybeans. As the nose wheel of his plane hit the furrows in the field, the field being planted in north-south rows, it crumpled and the airplane nosed over on its top.

Under this situation we think it was a question for a jury to decide whether the pilot failed to do what a reasonable and prudent person in his position would ordinarily have done under these circumstances and this situation or did what a reasonable and prudent person in his position would not have done under the existing circumstances; that is, whether to continue on toward Omaha, with the strong possibility of having to make an emergency landing at Atlantic on an unlighted airfield when he was not carrying flares, rather than to turn back to Des Moines and land there on a lighted

runway to check his gasoline supply and refuel his plane, if necessary.

"In an action to recover damages caused by alleged negligence, plaintiff must prove both negligence of defendant and that such negligence was the proximate cause of the injury complained of." Sippel v. Missouri P. Ry. Co., 102 Neb. 597, 168 N. W. 356. See, also, Tews v. Bamrick, 148 Neb. 59, 26 N. W. 2d 499.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which it would not have occurred." Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683.

If, under the situation hereinbefore set forth, a jury should find the pilot was negligent in failing to turn back and land at the Des Moines airport to check his gasoline and refuel his plane, if necessary, then it can be said that the jury could also properly find that such negligence on the part of the pilot was the cause of his having to make an emergency landing with the airplane at an unlighted airfield at Atlantic, which landing resulted in the accident and the proximate cause thereof. There is evidence in the record to support a finding that appellee suffered serious injuries as a result of the accident. In view of what we have said the appellant's contention that the record does not present a jury question is without merit.

A jury was impaneled to try this case on Monday, November 22, 1954. Trial was then recessed until Wednesday, November 24, 1954, at which time the appellee began the introduction of his evidence. At that time Lang's answer, which he had filed on February 5, 1954, contained the following allegation: "* * * admits that the airplane in which plaintiff was riding as a passenger made an attempted emergency landing at the time and place alleged; that said plane nosed over in said attempted emergency landing, necessitated by a shortage of fuel caused by a severe and unexpected

head wind, and that the plaintiff received some injuries, the nature and extent of which are unknown to this defendant." In addition thereto the answer contained allegations setting forth the defense of assumpton of risk. At the close of the day on November 24, 1954, which was the day before Thanksgiving, the trial was recessed until Monday, November 29, 1954, when it was continued. Sometime during the day of November 29, 1954, Lang was "given leave to file amended answer instanter," which he did. The effect of the amended answer is a general denial and a withdrawal of the above admission and defense. Did the trial court err in permitting Lang to file this amended answer instanter and, if so, was it prejudicial and grounds for granting appellee a new trial?

Section 25-852, R. R. S. 1943, provides as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

We have said this statute should be liberally construed in order to prevent a failure of justice. See, Louis Hoffman Co. v. Western Smelting & Refining Co., 150 Neb. 524, 34 N. W. 2d 889; Robinson Outdoor Advertising Co. v. Wendelin Baking Co., 145 Neb. 112, 15 N. W. 2d 388. As stated in Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811: "It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense. * * * In such

case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just." See, also, Miller Rubber Products Co. v. Anderson, 123 Neb. 247, 242 N. W. 449; Robinson Outdoor Advertising Co. v. Wendelin Baking Co., *supra*.

It appears that Lang was permitted to file an amended answer without any objections being made to his doing so and that appellee filed a reply thereto on November 30, 1954. This court has often held that: "Except where jurisdiction is involved, this court will consider on appeal only questions which have been presented to and passed upon by the trial court." Dodge v. Galusha, 151 Neb. 753, 39 N. W. 2d 539. See, also, Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N. W. 2d 170; Olson v. Shellington, *supra;* Greenberg v. Fireman's Fund Ins. Co., 150 Neb. 695, 35 N. W. 2d 772; Busch v. Hagenrick, 10 Neb. 415, 6 N. W. 474.

We think the foregoing principle is here controlling of this issue. But let us assume the question of the court's ruling is properly before us. The record shows the original answer filed February 5, 1954, was drafted, signed, and verified by Lang's counsel. As we said in Snyder v. Collier, 85 Neb. 552, 123 N. W. 1023, 133 Am. S. R. 682: "If plaintiff's petition is prepared, signed and verified by his attorney, and by mistake an erroneous statement is included therein, the court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation." This has particular application here because the evidence adduced at the time the court permitted the amended answer to be filed established that there were no severe and unexpected headwinds at the time and the record as a whole shows it was an erroneous statement inadvertently included therein by defendant's counsel.

But appellee contends the statements contained in Lang's original answer that the airplane had run out

of gas because of severe and unexpected headwinds were judicial admissions and required no proof on this issue. It is of course true, as we said in Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182, that: "A party may at any time invoke the language of the pleading of his adversary on which the case is tried on a particular issue as rendering certain facts indisputable; and in so doing he is neither required nor permitted to offer the pleading in evidence. * * * An admission made in a pleading on which the trial is had is more than an ordinary admission. It is a judicial admission and constitutes a waiver of all controversy so far as the adverse party desires to take advantage of it, and is therefore a limitation of the issues." See, also, Lash v. Erisman, 167 Neb. 606, 94 N. W. 2d 32; Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831. But here Lang was permitted to file an amended answer upon which the case was actually tried. Under this situation the following applies to admissions contained in Lang's original answer: "A pleading which has been superseded by an amended pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence in order to be considered. * * * The rule that a party may at any and all times invoke the language of his opponent's pleading as rendering facts therein alleged indisputable applies only to statements in the pleadings upon which the case is tried." In re Estate of McCleneghan, 145 Neb. 707, 17 N. W. 2d 923. See, also, Arman v. Structiform Engineering Co., 147 Neb. 658, 24 N. W. 2d 723; Miller v. Nicodemus, 58 Neb. 352, 78 N. W. 618.

Appellee contends the trial court's granting him a new trial is correct because it had erred in two respects in refusing him permission to amend his petition to conform to the proof, first, by refusing to permit him to include a charge of negligence to the effect that the defendant was negligent in failing to have flares aboard on a night flight as required by law and, second, in

refusing him permission to include a charge of negligence to the effect that the safety belt appellee was using was defective.

We have already set out the fact that the evidence shows the airplane was not carrying flares as either the federal statutes or regulations governing at the time required. There is also evidence to the effect that the safety belt appellee was using broke. The pilot testified the safety belt evidently had a flaw in it or it wouldn't have broken, that is, if it broke it was defective.

As we have already said, section 25-852, R. R. S. 1943, which applies to all parties involved in any litigation and permits amendments to their pleadings at any time during the course of the trial, should be liberally construed and applied in order to prevent a failure of justice. See, Dixon v. Coffey, *supra;* Robinson Outdoor Advertising Co. v. Wendelin Baking Co., *supra.* However, as stated in Anderson v. Moser, 169 Neb. 134, 98 N. W. 2d 703: "It is within the discretion of the trial court to permit or refuse an amendment of a pleading during the trial of a case, and error cannot be predicated on the action of the court in reference thereto unless an abuse of discretion is established to the prejudice of the party who is adversely affected thereby."

It is the rule of this court that: "A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby." Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041. See, also, O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322; Gleason v. Baack, 137 Neb. 272, 289 N. W. 349.

As stated in Barney v. Adcock, *supra:* "The violation of a statute intended to assure the safety of travelers on the public highways is not negligence as a matter of

law but may be considered with other evidence in deciding an issue of negligence." Likewise, we think, the violation of any provision of a federal statute, or rules or regulations promulgated thereunder which are intended to assure the safety of travelers in airplanes, is not negligence as a matter of law but may be considered with other evidence in deciding an issue of negligence.

It is true, as appellant contends, that ordinarily if a plaintiff wishes to amend his petition by inserting a new issue he should do so, after he has rested, by asking leave to withdraw his rest for that purpose and, if granted, to introduce his evidence in support thereof. If such request is granted then the defendant, if he makes it clear to the court that he is not prepared to meet the new issue, should be granted a continuance for that purpose upon such terms as the court may deem just. However, such procedure is not necessary if the evidence relied on by plaintiff is already properly in the record. The proper procedure in such cases is to ask leave to conform thereto.

Appellee, in his opening statement to the jury, withdrew all charges of negligence against the defendant, of which there were six, except the claim that the pilot failed to refuel en route when he had ample opportunity and time to do so and thus permitted the plane to run out of gas. It is apparent this came about because of the allegations of the defendant's original answer, hereinbefore set forth, upon which the trial started. By its rulings and instructions Nos. 1, 7, and 11, the trial court held the appellee strictly thereto. In this we think the trial court abused its discretion when appellee requested leave to amend to conform to the proof as to the flares; especially in view of the fact that the defendant had been permitted to change his position by the nature of the allegations of his amended answer. As to the second request to include a charge of negligence to the effect that the safety belt appellee

was using was defective, quite a different situation presents itself. There is no evidence showing any part of the safety belt was defective except the pilot's statement that it evidently had a flaw in it or it wouldn't have broken. But a safety belt is not such a piece of equipment that the doctrine of res ipsa loquitur applies thereto in case it breaks. In the absence of the doctrine applying there is no evidence upon which a jury could base its finding that it broke because it was defective. The pilot did not testify it was defective. He only assumed it must have been or it wouldn't have broken. As we said in Wessel v. City of Lincoln, 145 Neb. 357, 16 N. W. 2d 476: "A verdict may not rest on mere conjecture or speculation." In view thereof, we do not think the trial court abused its discretion when it denied appellee's request to include a specification of negligence relating thereto to conform to the proof.

We have already set forth the nature of flares and the use for which they are intended and can be put. In view thereof a jury could properly find that the failure to have such flares on board the airplane, when the pilot attempted to make an emergency landing at Atlantic on an unlighted airfield, was the proximate cause of the airplane missing the runway and landing in a field of soybeans adjacent thereto, which resulted in the airplane crashing and nosing over on its top.

Appellee also contends the trial court was correct in granting him a new trial because certain exhibits were, on objection thereto by defendant, erroneously excluded. These exhibits consisted of letters from a division of the Civil Aeronautics Administration located at Des Moines, Iowa, and a regional office thereof located at Kansas City, Missouri, addressed to Lang and Vequist, respectively, and admittedly received by them. These exhibits were offered by appellee solely for the purpose of impeachment. In Drewes v. State, 156 Neb. 319, 56 N. W. 2d 113, we said: "Impeaching evidence is that

which is directed to the question of the credibility of the witness."

In regard to the C.A.A.'s investigation of the accident Lang testified he was present at the airfield at Atlantic on the day after the accident happened, when two inspectors for the Des Moines office of C.A.A. investigated it; that no charge of any kind or character was ever made by the government against him for violation of any rule or regulation as a result thereof; and that the C.A.A. gave him a clean bill of health. Defendant offered in evidence a certified copy of certain records on file in the Records Section, Bureau of Safety Investigation, Civil Aeronautics Board in Washington, D. C., covering the accident to support this contention. It is apparent that defendant's counsel made much use of the fact, as contended, that Lang and the pilot had been given a clean bill of health by those in authority. However, the letters above referred to clearly evidence that such was not the fact for they show that the Civil Aeronautics Administration found Lang and the pilot guilty of violating certain provisions of the Civil Air Regulations and provisions of the Civil Aeronautics Act of 1938, as amended. These violations, as evidenced by the letter addressed to Lang dated October 8, 1952, related to his failure to have flares on the airplane when its flight was planned to continue beyond sunset; in carrying inadequate fire extinguishing equipment thereon; and in not carrying adequate first aid equipment thereon. As to the pilot the findings were the same except that it did not contain any finding of violation as to fire extinguishing equipment carried thereon being inadequate. It may be, as appellant contends, that these exhibits were not admissible as substantive proof. See 49 U. S. C. A., § 1441(e). We do not pass on that issue for such is not the situation. Here these letters were offered solely for impeachment purposes. We think they should have been received for that purpose and, under the circumstances disclosed by the record, we think it was

very prejudicial for the trial court to exclude them. See 98 C. J. S., Witnesses, § 537, p. 473.

This litigation has already unnecessarily extended over a long period of time and unfortunately Lang has died in the meantime, but these facts are not here controlling. The record shows appellee has never had an opportunity to fairly present his case to a jury. In view of what we have herein said and held we affirm the trial court's judgment granting appellee a new trial.

AFFIRMED.

IN RE APPLICATION NO. 5218, WATER DIVISION NO. 2-C, AINSWORTH IRRIGATION DISTRICT.
AINSWORTH IRRIGATION DISTRICT, APPELLEE, V. JEROME BEJOT ET AL., APPELLANTS.
102 N. W. 2d 416

Filed April 8, 1960. No. 34747.

1. **Estoppel.** A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party.
2. **Appeal and Error.** On appeal to this court from an order of the Department of Water Resources, the primary questions to be determined are generally whether such department acted within the scope of its authority and whether its findings and order complained of are supported by competent evidence or are unreasonable and arbitrary.
3. **Statutes.** Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts and administrative tribunals such as the Department of Water Resources may resort to historical facts or general information to aid them in interpreting its provisions.
4. ———. The construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the Legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong.

5. ———. Long continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.
6. ———. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted.
7. **Waters: Statutes.** Section 46-206, R. R. S. 1943, deals primarily with the limitation of the amount of water that may be appropriated and taken from rivers or streams more than 100 feet wide, and section 46-265, R. R. S. 1943, deals with the return of unused water transported in irrigation ditches or canals by the owner or owners thereof in order to prevent waste.
8. ———: ———. Such sections are not in conflict if the water of the river or stream from which appropriated and taken is transported by irrigation ditches or canals to lands in the same basin or watershed and the unused water is returned into a river or stream in the same basin or watershed where it naturally would have flowed in any event but for the appropriation and taking.

APPEAL from the Department of Water Resources. *Affirmed.*

Quigley & Quigley and *Mason, Knudsen, Dickeson & Berkheimer,* for appellants.

William C. Smith, Jr., Bert L. Overcash, Allen L. Overcash, and *Woods, Aitken & Aitken,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

This appeal involves an application of Ainsworth Irrigation District, hereinafter called plaintiff, seeking an appropriation of water from the Snake River for irrigation purposes. Such "Application No. 5218, Water Division No. 2-C" was filed with the Department of Roads and Irrigation, now the Department of Water Resources, on March 26, 1953, by one Vern P. Lindholm, as authorized agent for the benefit of plaintiff as named therein, in order to preserve a priority date for plaintiff pending entire and proper completion of its organization on

August 10, 1953, after which time Vern P. Lindholm admittedly assigned said application to plaintiff. In form and substance the application conformed with the requirements of section 46-233, R. R. S. 1943, now section 46-233, R. S. Supp., 1959, as amended and effective September 20, 1957. For approval and confirmation of plaintiff's organization as an irrigation district and its contract with the United States, see Ainsworth Irr. Dist. v. Harms, *ante* p. 228, 102 N. W. 2d 429.

On March 30, 1955, five named objectors, only one of whom appears as objector in this proceeding but who were all represented by the same counsel as appear herein, filed a motion with the department requesting it to withdraw "Application No. 5218, Water Division No. 2-C. Ainsworth Irrigation District * * * filed * * * on March 26, 1953," and return it to said district because it contained a request "for a trans-watershed diversion of the waters of the Snake River * * * beyond the authority and jurisdiction of the Department of Roads and Irrigation * * * to grant * * * and that in the event the request and motion is denied that the above-named parties be granted sufficient time to file objections to matters raised in the application for the purpose of making up issues to be determined by evidence adduced at a hearing on the merits of the application." After notice, an informal conference was held with relation thereto on April 18, 1955, in the office of the department by objectors' counsel, several other attorneys, interested parties, and the State Engineer. Thereafter, on May 3, 1955, the State Engineer wrote objectors' counsel, saying in part: "As you know, Application 5218 was filed by the Ainsworth Irrigation District on March 26, 1953, and it has been pending since that date. This application is for a permit to appropriate the waters of the State of Nebraska for the irrigation of the lands of the district by means of a canal and distribution system to be constructed by the U. S. Bureau of Reclamation when funds are appropriated for that purpose.

"We do not feel that it would be proper procedure for this department to withdraw Application 5218 from our files and return it to the Ainsworth Irrigation District at this time, and we are not complying with the request to do so in Paragraph A of the motion and request.

"The parties named in your motion and request will be given notice before any action is taken on Application 5218 and ample time for filing objections will be granted as requested in Paragraph C of the motion and request."

In that connection, section 46-238, R. S. Supp., 1959, effective September 20, 1957, provides in part: "Any application for an appropriative right which is deficient by reason of past failure to comply with any of the requirements of sections 46-233 and 46-238 for the perfection of an appropriative right, which application has not been dismissed or denied, is also hereby ratified and confirmed; unless, within one year from September 20, 1957, a petition * * * to forfeit, cancel or otherwise invalidate such an application for an appropriative right, shall have been filed with the department by a person affected adversely thereby." Admittedly, no such petition was ever so filed by defendants herein or any of them with the Department of Water Resources, and no question was raised regarding validity of plaintiff's application except upon the ground aforesaid until July 7, 1959.

On July 7, 1959, objections to plaintiff's application were filed by nine named objectors, hereinafter called defendants. One of such objections was that plaintiff's application was null and void because it was filed in the name of the Ainsworth Irrigation District before its organization was completed. We believe that this is the proper place to dispose of that objection. In that connection, plaintiff has at all times regarded and treated Application No. 5218 as its own, and has at all times accepted the benefits and obligations thereof, as it had a right to do. See, 1 Fletcher, Cyclopedia Corporations

(Perm. Ed.), § 207, p. 681; 13 Am. Jur., Corporations, § 102, p. 246, § 103, p. 247, citing numerous authorities from this and other jurisdictions. From the time of filing the application on March 26, 1953, until July 7, 1959, defendants treated the application as that of plaintiff, except to claim on the latter date that it was invalid only because of alleged "trans-watershed diversion." Plaintiff and the department as well were thus led by defendants to believe and assume, until July 7, 1959, that the application was that of plaintiff, and that defendants claimed invalidity only because of alleged "trans-watershed diversion." Also, defendants had ample notice and opportunity to file a petition, as provided by section 46-238, R. S. Supp., 1959, and thus attack validity of the application, but they admittedly failed to do so. We conclude that they are not now in any position to claim that the application was void because it was filed in the name of the Ainsworth Irrigation District before its organization had been completed.

As recently as Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment, *ante* p. 77, 101 N. W. 2d 856, citing numerous authorities, this court held: "A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party."

In defendants' objections, one defendant, Harold Harms, simply alleged that he was the owner in possession of described lands in Cherry County. In that connection, the record discloses that such lands do not abut on the Snake River and are outside the irrigation district, but will be crossed in part by plaintiff's proposed irrigation canal. Another defendant, Garret O. Swanson, simply alleged that he was the owner in possession of described lands which abut upon the Snake River. In that respect, the record discloses that such lands are outside the irrigation district, but that 40 acres owned by him abut upon the Snake River some

distance above plaintiff's proposed dam and reservoir area, and that he has a one-fourth interest in other lands nearby. The remaining seven defendants alleged that they were owners in possession of described lands which total only 1,213 acres, representing 3.3 percent of the total area within the district. Of course, they would ordinarily be subject to the burden of water and the plaintiff's contract with the United States, appearing in this record and referred to in Ainsworth Irr. Dist. v. Harms, *ante* p. 228.

In that connection, plaintiff argued that none of defendants had any right to appear and object to plaintiff's application or appeal to this court, because they were not legally affected and had no legal interest in this proceeding for an appropriation. At least six defendants, who admittedly owned land within the district, we believe would be legally affected by the appropriation and had a legal interest in this in rem proceeding which plaintiff would be required to prosecute and establish before the Department of Water Resources to obtain an appropriation in any event, whether or not anyone objected. See, Ainsworth Irr. Dist. v. Harms, *ante* p. 228. We conclude that such six defendants had a right to object to plaintiff's application and to appeal to this court. However, whether or not defendants Harms and Swanson would be legally affected, or had a legal interest which would entitle them to object to plaintiff's application and appeal to this court, we need not decide in this proceeding in order to dispose of the case under the circumstances presented herein.

As far as important here, defendants' other objections were in substance as follows: (1) That the Department of Water Resources was without authority to approve plaintiff's application because the proposal involved the unlawful diversion of water from the Snake River and transportation thereof in a canal across the watersheds of Gordon Creek and several other named

creeks before it reaches the lands in the irrigation district from whence the unused waters would run into the Niobrara River, in violation of section 46-265, R. R. S. 1943; (2) that the proposed diversion of water was unlawful under the provisions of section 46-206, R. R. S. 1943, because the width of the Snake River at point of diversion of plaintiff's canal is less than 100 feet; and (3) that approval of plaintiff's application would be detrimental to the public welfare and deprive defendants of equal protection of the laws and of property without due process of law. Defendants prayed for a denial and dismissal of plaintiff's application.

On July 10, 1959, plaintiff filed an answer which traversed defendants' objections; and prayed for a denial of said objections and for granting of plaintiff's application. Defendants' reply, filed July 15, 1959, was in the nature of a general denial. A full and final hearing was held by the Director of Water Resources from July 21 to July 23, 1959, whereat the parties adduced evidence and thereafter filed briefs. Subsequently, on September 4, 1959, orders were rendered by the department overruling defendants' objections and approving plaintiff's application.

The order overruling defendants' objections found and adjudged substantially as follows: (1) That if Application No. 5218 was deficient when filed by reason of nonexistence of Ainsworth Irrigation District, it was validated by Vern P. Lindholm's assignment to plaintiff, and that the application became ratified and confirmed under the provisions of section 46-238, R. R. S. 1943 (now section 46-238, R. S. Supp., 1959); (2) that because waters of the Snake River discharged into the Niobrara River, and substantial portions thereof will continue to do so when diversions are made for the proposed Ainsworth project, and the Niobrara River is essentially the same stream as the Snake River, and also because both streams are a part of the same river basin, the diversion as proposed by plaintiff's application

will not be a violation of sections 46-206 and 46-265, R. R. S. 1943, as interpreted by the Supreme Court of this state, and as they have been administratively interpreted by the department and its predecessors; and (3) that the granting of a permit to use waters of the Snake River under plaintiff's application will not be detrimental to the public welfare.

The order approving plaintiff's application and certifying approval thereof by the department, as provided in section 46-235, R. R. S. 1943, was made subject to certain limitations and conditions. As far as important here, they were in substance as follows: That the source of the appropriation was the Snake River; that the water appropriated should be used for irrigation purposes only; that priority date of the appropriation was March 26, 1953; that on or before March 4, 1960, plaintiff should file a map in the office of the department as provided by section 46-237, R. R. S. 1943, and in accordance with rules and regulations of the department; provided that work of construction should begin on or before March 4, 1960, and be prosecuted to completion as provided in section 46-238, R. R. S. 1943 (now section 46-238, R. S. Supp., 1959), unless temporarily interrupted by some unavoidable and natural cause; fixed a time for completing work of construction as November 30, 1970; limited the amount of plaintiff's appropriation to one-seventieth of a cubic foot of water per second of time for each acre of land to which water is actually and usefully applied on or before October 31, 1975; provided that the department may require installation of a measuring device as provided by section 46-256, R. R. S. 1943; provided that the rights of owners of land bordering on streams in Water Division No. 2-C to use water for domestic purposes, including the watering of livestock, must be respected; provided that the prior rights of all persons who, by compliance with the laws of Nebraska, have acquired the right to use the waters of the natural streams of the state, must not be

interfered with by the use of water under this permit; recited that the record shows that there are periods during some years when the supply of water in the Niobrara River Basin is not sufficient to meet the requirements of all those having appropriations for its use, therefore applicant is given notice that it may be denied the use of water during times of scarcity; and that said "Section 6, Article XV, Constitution of Nebraska, 1920, and Sections 70-668 and 70-669, Reissue Revised Statutes of Nebraska, 1943, govern the use of water, and provide that no inferior right to the use of the waters of this State shall be acquired by a superior right without just compensation therefor to the inferior user with prior rights." Thereafter defendants' motion for rehearing was overruled and they appealed to this court, assigning in substance: (1) That the findings and determination of the department were contrary to the application, evidence, and law; and (2) that defendants were denied due process and equal protection of the law. We do not sustain defendants' assignments.

With regard to defendants' last assignment, they make no contention that the irrigation statutes and laws deny defendants due process or equal protection. However, citing and quoting from 12 Am. Jur., Constitutional Law, § 566, p. 257, defendants contend that the department in its administration of the law has made its own law by administrative fiat, and thereby discriminated against defendants and denied them equal protection of the law by refusing to give them protection on a parity with that afforded objectors in Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N. W. 334, upon which defendants primarily rely.

In that opinion, this court concluded that under the established policy of this state, water for irrigation purposes taken from the Platte River or its tributaries could not be lawfully diverted over and beyond the southern watershed of that stream and applied to lands

situated beyond and without the basin of the Platte River. In other words, the primary issue decided in that case was that "waters of the Platte river" could not be lawfully transported "through and across the divide or watershed which separates the Platte river system from the basins of the Blue and Republican rivers (both tributaries of the Kansas river and constituting a part of its system), and therewith irrigate lands situated wholly outside the Platte river valley and beyond the watershed thereof." As hereinafter observed, we have no comparable situation in the case at bar.

Before proceeding further, we point out that defendants and their counsel as well had timely notice and knowledge that plaintiff's application had been filed with the department, together with timely notice and ample opportunity to file a petition attacking its validity within 1 year from September 20, 1957, but they admittedly failed to do so as required by section 46-238, R. S. Supp., 1959. Also, as shown by the opinion in Ainsworth Irr. Dist. v. Harms, *ante* p. 228, defendants and their counsel as well had timely notice and ample opportunity to defend and did defend in that special in rem proceeding and appeal therefrom to this court. Further, defendants and their counsel as well had timely notice and ample opportunity to defend in the case at bar, and they did so. No contention is made otherwise.

We point out also that in this proceeding defendants called but one witness who was a licensed professional consulting engineer in Lincoln. None of defendants testified at the hearing. There is no evidence that defendant Swanson, some of whose land admittedly abutted on the Snake River some distance above plaintiff's proposed dam and reservoir area, ever used any water from or had any appropriation of water from the Snake River, and if he did, every right which he had, if any, was protected by the department's final orders and the law. The same is true of defendant Harms, a part of whose land would be crossed by plaintiff's pro-

posed canal. As said in Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. S. R. 647, 60 L. R. A. 889, quoted with approval in Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N. W. 2d 397: "While there are some questions affecting property rights which grow out of the administration of the law by the state board of irrigation (now the Department of Water Resources), and in which are involved matters in dispute calling for action of a quasi-judicial character, yet as to all these ample provisions are made for recourse to the courts." We conclude that under the circumstances presented in this case, defendants could not and have not been deprived of any constitutional rights as argued by them.

In Nebraska Mid-State Reclamation District v. Hall County, *supra,* we said: "Article XV, section 4, Constitution of Nebraska, provides: 'The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.' A natural want is one absolutely necessary to human existence. Therefore, its legislative conservation and control for such uses is a public purpose." In that connection, Article XV, section 5, Constitution of Nebraska, provides: "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section." Such "following section" is section 6, which provides: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the

water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user."

This court has concluded in cases comparable with that at bar that on an appeal to this court from an order of the Department of Water Resources, the primary questions to be determined are generally whether such department acted within the scope of its authority and whether its findings and order complained of are supported by competent evidence or are unreasonable and arbitrary. See State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N. W. 239. We conclude that the department had authority to make the findings and orders herein about which defendants complained, and that as hereinafter observed, they were not unreasonable or arbitrary.

The record is voluminous. We can only summarize the relevant and material competent evidence with relation to the primary question of whether the Snake River and the Niobrara River are essentially one stream and a part of the same river basin and watershed, and whether the Snake River exceeds 100 feet in width so that diversion of water therefrom by plaintiff for irrigation purposes would not be a violation of sections 46-206 and 46-265, R. R. S. 1943, as found and adjudged by the Department of Water Resources. In that connection, section 46-206, R. R. S. 1943, provides: "The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred feet, in which event not more than seventy-five per cent of the regular flow shall be taken." Also, section 46-265, R. R. S. 1943, provides: "The owner or owners of any irrigation ditch or canal shall

carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri river."

The record discloses that the Ainsworth Irrigation District unit is an integral component of the comprehensive "Missouri River Basin Project." The physical and economic feasibility of the Ainsworth unit was approved by the Department of the Interior, and its construction was approved and authorized by the Congress of the United States. The proposed physical facilities of the Ainsworth Irrigation District are demonstrated on a map, exhibit No. 30, prepared by a witness for plaintiff, who was a civil engineer with the Bureau of Reclamation at Ainsworth since 1948, and who has worked on the Ainsworth project making field surveys from the river down to the lands to be irrigated, and in the bureau office making purchasing and cost estimates for feasibility reports. The Snake River flows north and slightly east into the Niobrara River, which first meanders north and east, then gradually turns and meanders east and southeast, and eventually empties into the Missouri River. Plaintiff's proposed Merritt Dam was planned and designed by the head of the earth dam design section of the Bureau of Reclamation in Denver, Colorado. The dam and reservoir will be constructed on the Snake River several miles south of its confluence with the Niobrara River. The dam will be some 140 feet high, with a spillway capacity of 1,150 cubic feet of water per second, and will store some 68,600 acre feet of water for irrigation. Due to high elevation of the area surrounding the dam and reservoir, it is unlikely that any land in the vicinity will be damaged by seepage. Plaintiff's canal, having an initial capacity of 620 cubic feet per second for carriage of water to the unit lands from the dam, will be constructed about 56 miles. It first extends in a northeasterly di-

rection, then gradually east and south, thence northeast to and through the lands to be irrigated, with unused waters eventually emptying into the Niobrara River, where they would have been eventually carried in any event. Enroute, plaintiff's canal will intersect and cross several smaller streams or watercourses, as authorized by section 46-153, R. R. S. 1943, all of which streams are tributaries of and flow north or northeast, where they eventually empty into the Niobrara River. In that connection, the canal will be fenced throughout, and constructed with typical siphons, cross drains, culverts, drops, and checks. Where the canal is above ground water, it will be lined with concrete and in the ground water area it will be given a gravel stabilizing lining. The problem of seepage has been given careful study and losses are expected to be normal, that is, "three-tenths of a cubic foot per square foot of canal perimeter," which has been the bureau's experience in 17 western states.

The project will irrigate 33,960 acres of generally flat and smooth table lands, ideally situated and classified for irrigation, farming, and stock raising. Such lands, with minor exceptions, have a top soil of 18 inches. As shown by a comparison exhibit, the Ainsworth project has the highest benefit cost ratio of seven other units included in the general development plan for the Missouri River basin. The project meets all the feasibility requirements of the federal government, with costs beyond the ability of the farmers to repay being "met by surplus power revenues of the basin-wide project." In computing production with and without irrigation, conservative consideration was given to the "best data * * * available from the State." Thus, it is estimated that by increasing net farm and livestock income by irrigation, the farmers will absorb the reasonable water charges payable without interest over a period of 40 years and greatly improve their financial situation. The evidence shows that from 1928 to 1952,

effective precipitation in the area was never sufficient to meet the demands of full crop production except in 1951, and then precipitation was not equitably distributed. Ordinarily, rainfall is sufficient in April, May, and June to give crops in the area a start, but in July, August, and September, when crops are maturing and need for rainfall is greatest, it is generally uncertain and inadequate. Without dispute, dry farming in the area was generally unsatisfactory or impossible, and pump irrigation is generally prohibitive in cost and not an adequate solution for water needs in the district.

The annual flow of the Snake River for 25 years has averaged about 192,300 acre feet of water per year, which is of excellent quality for irrigation, and only 91,800 acre feet annually will be diverted by the project, which represents only about 47 percent of the annual flow of the Snake River at Merritt Dam site. There are only a few small appropriations located upstream having any priority date, and as far as this record shows, no defendant herein holds any appropriation, or makes any claim to use of the water. It appears to be undisputed that there is plenty of water for all needs. The only appropriations downstream are two small power plants owned by Consumers Public Power District, who admittedly will be compensated if they are damaged.

This record does not show any substantial dispute that the Snake and Niobrara Rivers were in fact and law a single stream, basin, or watershed. Defendants called but one witness who became a licensed engineer in 1953 and worked for the Department of Roads and Irrigation on matters other than irrigation until 1956. He had made no field survey of any kind, and testified entirely hypothetically from topographic maps. He never had been employed as a consultant by any irrigation district. He at first defined a watershed as "a divide line where water will run in opposite directions," inferring thereby, as argued by defendants, that the Snake River and every stream or watercourse in the

area, which are all tributaries of and empty into the Niobrara River, had a separate watershed across which plaintiff could not transport water for irrigation, as it proposed to do. However, defendants' witness conceded that another definition of a watershed would place all of the area involved in the Niobrara River watershed. In that regard, he was asked: "Q You have talked about watersheds. A Right. Q What do you understand a watershed to be? A There are two definitions of watershed. The definition I was using was a divide line where water will run in opposite directions. The other definition would be toward a drainage area that drains into a given creek or stream. Q Within the latter definition, would you say this is all in the Niobrara watershed? A Yes sir." He was also asked: "Q Both surface and underground flow is in that direction? (Northeast) A Generally, they follow the same lines, yes. Q This whole area could be said to be part of the Niobrara drainage area? A That is true, yes sir."

Defendants also offered in evidence from exhibit No. 29, Geological Survey Water Supply-Paper 1371, p. 9, the following: "The Ainsworth unit lies within the Niobrara River basin and is drained by both overland runoff and subsurface outflow to the Niobrara River and its tributaries." Defendants further offered in evidence from exhibit No. 13, the final report of the Department of Interior, p. 55, which assumed that there was no diversion of water from one watershed to another, since the "return flows will naturally find their way and thus be in the same location within the State as though they never had been diverted."

A consulting engineer with offices in Denver was called as a witness by plaintiff. He has continuously practiced engineering since 1919 "entirely within the field of water development" and related matters. He and his firm carry on extensive state, national, and international activities in that field, having other offices

in at least five named foreign countries. The record contains a lengthy review of the many projects with which the witness has been or is now associated, including his services as consultant in disputes involving the use of waters in various streams and rivers. Thereafter he defined the pertinent terms "from an engineering standpoint" as follows: "When a river is spoken of, it generally means a river and all its tributaries above a given point, which is the point on the river that is being dealt with. A river and all its tributaries constitutes a watershed, which may be defined as all the area lying within a divide, above a given point on a river or stream. The term watershed is synonomous (sic) with river basin, drainage basin, or catchment area, except in some instances, where by definition for specific purposes, in connection with specific agreements, the basin may have been extended upon the natural watershed." He also cited concrete applications of such definition in several projects. In speaking of the Snake and Niobrara Rivers, he testified: "I defy anyone to delineate a divide between those two streams. * * * I can't distinguish between the Snake and Niobrara. It is one watershed and no one can define it otherwise." Also, in the final analysis, defendants' only engineering witness did not disagree. In support of his definitions and conclusions aforesaid, and to illustrate previous administrative action by the state department in compliance therewith, plaintiff's witness prepared a large map reflecting all of the streams, systems, basins, and watersheds in Nebraska where irrigation development has occurred. Speaking with reference to defendants' contention, he testified that: "Under that concept there could not have been development of the major projects within the Platte river watershed, nor within the Republican river watershed, nor within the Loup river watershed. Development would be very much more minor than it is at the present time, and probably would be almost nil."

Contrary to defendants' contention, the foregoing evidence adduced by plaintiff was properly admitted for consideration of the department in making its findings and orders. In that connection, we have held that: "Where the general intent of the Legislature may be readily ascertained, yet the language used in a statute gives room for doubt or uncertainty as to its application, courts may resort to historical facts or general information to aid them in interpreting its provisions." Placek v. Edstrom, 148 Neb. 79, 26 N. W. 2d 489, 174 A. L. R. 856.

We have also held: " 'That construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Constitution, or is clearly wrong.' State v. Bryan, 112 Neb. 692, 200 N. W. 870." Chicago & N. W. Ry. Co. v. Bauman, 132 Neb. 67, 271 N. W. 256.

Also, we have held that: "Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law." Flint v. Mitchell, 148 Neb. 244, 26 N. W. 2d 816.

Further, we have held that: "When a statute * * * is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter should be adopted." Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571.

Webster's New Twentieth Century Dictionary (2d Ed.), Unabridged, 1956, p. 2068, defines "watershed" as: "1. a ridge or stretch of high land dividing the area drained by different rivers or river systems. 2. the area drained by a river or river system." See, also, Webster's New International Dictionary (2d Ed.), Unabridged, 1943, p. 2886, which defines "watershed" as:

"The whole region or area contributing to the supply of a river or lake; drainage area; catchment area or basin."

In that connection, it is interesting to note that for administrative purposes by the Department of Water Resources, section 46-215, R. R. S. 1943, provides: "The State of Nebraska is hereby divided into two water divisions, denominated water division No. 1 and water division No. 2, respectively." Also, section 46-217, R. R. S. 1943, provides: "Water division No. 2 shall consist of all lands that may be watered from the Loup, White, *Niobrara* and Elkhorn rivers and their tributaries, and all other lands of the state not included in any other water division." (Italics supplied.) In such respect, plaintiff's application was entitled: "Application No. 5218. Water Division No. 2-C."

As we view it, the Snake River and the Niobrara River are for all intents and purposes but one and the same stream, comprising the same watershed or basin, and could as well have been called the north and south Niobrara. Under the circumstances in this case, a mere matter of having different names does not control the physical attributes or the character of the area through which they flow as one river basin or watershed without any dividing line between them. Cases comparable in all material respects are not cited or found, but statements found in some authorities are helpful in arriving at such conclusion.

In Dern v. Tanner, 60 F. 2d 626, it is said: "Tributary waters, branches, are inseparable parts of the main stream, and with it are subject to common appropriation and control in so far as reasonably necessary in irrigation as in navigation." The Snake River is admittedly a tributary of the Niobrara River.

Also, in E. C. Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417, citing authorities, it is said: "The mere fact that Wolf Creek has a separate name

and extends through another county does not make it less a part of Bear River."

In Osterman v. Central Nebraska Public Power & Irr. Dist., *supra,* this court took the position that the "Platte River or its tributaries" constitute one stream and basin or watershed. See, also, Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N. W. 2d 415, which treated the Frenchman River and Stinking Water Creek as one stream.

We point out again that appellants in Osterman v. Central Nebraska Public Power & Irr. Dist., *supra,* admittedly attempted to transport water by canal from the Platte River basin or watershed across and into the Republican River basin or watershed to therewith irrigate lands situated wholly outside the Platte River valley basin and beyond the watershed or basin thereof. Objectors therein were either appropriators whose rights were based upon state irrigation laws, or riparians whose claims were incident to and arose out of ownership of and possession of lands bordering upon the Platte River or through which it ran, whose titles were initiated by settlement as early as 1857, and for which government patents issued earlier than 1870. The broad inference to be logically drawn from that opinion is that the state will not give its sanction to an appropriation of water which would in effect remove the waters of a river or stream from its natural basin or watershed and thereby cause it to be transported to another basin or watershed and lost to the communities which have grown up and developed in that basin or watershed. The opinion is entirely distinguishable as we view it from the case at bar on the facts and applicable law.

There is another factor which also becomes important in this case. Such factor is whether or not the Snake River exceeds 100 feet in width in order to come within the exception provided in section 46-206, R. R. S. 1943.

In that connection, section 46-206, R. R. S. 1943, deals primarily with a limitation of the amount of water that

may be appropriated and taken from rivers or streams more than 100 feet wide, and section 46-265, R. R. S. 1943, deals with the return of unused water transported in irrigation ditches or canals by the owner or owners thereof in order to prevent waste thereof. Although at first such sections seemingly are in conflict, in fact they are not if the water of the river or stream from which appropriated and taken is transported by irrigation ditches or canals to lands in the same basin or watershed and the unused water is returned into a river or stream in the same basin or watershed where it naturally would have flowed in any event but for the appropriation and taking.

This record overwhelmingly establishes that substantial relevant portions of the Snake River exceed 100 feet in width and that "there are times when the Snake river has a greater flow, and times when the Niobrara has a greater flow at the point of confluence." Admittedly, plaintiff would take for irrigation only about 47 percent of the Snake River flow. Admittedly, defendants' engineer never visited the area to make any inspection, survey, or measurements of the Snake River. His measurements of the width of the Snake River at some six points thereon were taken from an enlarged reproduction of an aerial photograph obtained from the files of the Department of Roads and Irrigation. Such photograph was admittedly taken September 30, 1939, some 20 years prior to this hearing. In that respect, his testimony that the widest such point on the Snake River was only 83 feet has little or no weight in this proceeding. We again call attention to the fact that such witness also admitted that the entire area here involved was in the Niobrara River basin or watershed.

On the other hand, plaintiff called as a witness a geologist for the Bureau of Reclamation on the Ainsworth project. He was born and raised in Ainsworth. He testified not only from experience since 1946 as a geologist for the bureau, but from experience in the

precise area for 12 years prior to 1943 while doing field work for the American Museum of Natural History. He identified a series of maps prepared by the bureau from field surveys which show that substantial portions of the Snake River exceed 100 feet in width. One such, exhibit No. 64, shows the upper end of the proposed reservoir area behind the proposed Merritt Dam. Such area, exceeding 100 feet in width, is colored blue, and comprises "about 12,000 feet, or somewhat over two miles." Another, exhibit No. 65, reflects an area downstream from exhibit No. 64, and so shows a "comparable" area exceeding 100 feet in width. Another, exhibit No. 66, being the "easternmost section of the three maps," so shows "those portions of the river where the waterway exceeds 100 feet." He testified that the three maps show "a reach of five river miles" where "the stream width exceeds 100 feet * * *. In fact, I know of places below the dam where this river width exceeds 100 feet."

Quadrangle maps appearing in this record also show that the Snake River exceeds 100 feet in width in the same or other areas. In such respect, exhibit No. 69, covering the proposed dam area, shows 10 such areas above the dam site and one below, varying in length from a few hundred feet up to a mile. Exhibit No. 70 reflects some 15 miles of the Snake River on upstream from exhibit No. 69, and shows 24 such areas of the same length. Exhibit No. 71 also joins exhibit No. 70 and reflects about 15 miles of the Snake River. It shows 25 such areas varying in length from a few hundred feet up to three-quarters of a mile.

In the case at bar, the proposed location and construction of irrigation canals and ditches, as well as the lands to be irrigated by the same, are located in and limited to the Niobrara River basin or watershed containing the source of the water to be used. All unused waters will be returned to the Niobrara River, thence to the Missouri River, where they would naturally have

flowed in any event through the Snake River and all other tributaries of the Niobrara River which lie in its basin or watershed. To hold otherwise would deprive 33,960 acres of irrigable land of needed water and permit it to be wasted in the Niobrara and Missouri Rivers, without authority of fact and law.

In this case, the orders of the Department of Water Resources properly appropriated and permitted water to be taken from the Snake River, which exceeds 100 feet in width, and is part and parcel of the Niobrara River basin or watershed. The findings and orders of said department are fully supported by the record and law. We conclude that the findings and orders of the Department of Water Resources should be and they are hereby affirmed. All costs are taxed to defendants.

AFFIRMED.

CARL LINDGREN ET AL., APPELLEES, V. SCHOOL DISTRICT OF BRIDGEPORT ET AL., APPELLANTS, IMPLEADED WITH EMMA B. HOPPEL ET AL., APPELLEES.

102 N. W. 2d 599

Filed April 15, 1960. No. 34740.

1. **Schools and School Districts: Estoppel.** The refusal of a school district board to admit a nonresident pupil to its high school under the discretionary provision of section 79-4,100, R. R. S. 1943, does not operate as an estoppel upon the members of the board to appeal from a decree holding that the proceedings transferring lands belonging to the pupil's parents into such district are void.
2. **Courts: Actions.** A litigant has no vested right in a mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending is properly triable under the changed procedure after the enactment becomes effective, unless the procedure is specifically retained by a saving clause.
3. **Statutes.** The general saving clause statute, section 49-301, R. R. S. 1943, relates to substantive and not to procedural law.
4. ———. The procurement of a bill of exceptions is a pro-

cedural matter and, when completed in accordance with a new statute after the effective date of such statute, it is properly obtained under controlling law.

5. **New Trial.** A motion for a new trial in an equity suit is required only if a review is sought of rulings of the trial court on alleged errors occurring at the trial, such as rulings on the rejection or reception of evidence.
6. **Schools and School Districts.** The granting of petitions by a county superintendent after notice and hearing, as provided by section 79-402, R. R. S. 1943, need not be entered with the formality of a judgment of a court of law. The rendition of an order granting the petitions and an entry thereof at an appropriate time and place is all that is required.
7. ———. A valid order of a county superintendent, made pursuant to section 79-402, R. R. S. 1943, is final as to all matters properly determined by it, unless a review thereof is sought, and as to such matters it is not subject to collateral attack.
8. **Injunctions.** An injunction suit to enjoin the enforcement of such an order is a collateral attack upon it and is not available unless the order is wholly void and not merely erroneous.
9. **Schools and School Districts.** The finding of a county superintendent, inherently contained in the grant of the petitions, that 55 percent of the voters of the district were signatory thereto, is a final determination of that fact unless a review thereof is sought, which may not be collaterally attacked unless it appears from the face of the petitions that they are void.
10. ———. The words "each district affected," contained in section 79-402, R. R. S. 1943, mean each school district in its entirety that is involved in the proceeding.
11. ———. The words "each district affected" do not refer to lands being transferred from one district to another, and no petition is required from the voters in the territory being detached from one district and annexed to another.
12. ———. When lands are transferred from one district to another under the provisions of section 79-402, R. R. S. 1943, the district from which the lands are detached retains its identity and the assets and unbonded obligations of such district by virtue of the specific provisions of such statute.
13. ———. Petitions initiated under section 79-402, R. R. S. 1943, for detaching lands from one district and annexing them to another, do not require a provision specifying the disposition of assets and unbonded indebtedness, since such disposition is made by statute.
14. **Constitutional Law: Schools and School Districts.** The transfer of lands from one district to another, initiated by petitions signed by the required number of voters, and granted by the

county superintendent after notice and hearing, and from which order a judicial review is available, meets all the requirements of due process.

15. **Schools and School Districts: Taxation.** A voter and taxpayer of a school district has no interest in the tax funds of a district, lawfully collected, other than to see that they are used for the public purpose for which levied.

16. ———: ———. The provision that tax funds previously levied and collected shall remain the property of the district remaining after the proper transfer of a part of its lands to another school district is within the province of the Legislature, and is not inhibited by constitutional provisions.

17. **Schools and School Districts.** Mere irregularities in proceedings to detach lands from one school district and annex them to another, under section 79-402, R. R. S. 1943, do not have the effect of vitiating the proceedings and subjecting them to collateral attack.

18. ———. Sections 25-520.01 to 25-520.04, R. S. Supp., 1957, do not require the service of personal notice upon the voters of the districts affected of the hearing by the county superintendent provided for in section 79-402, R. R. S. 1943.

APPEAL from the district court for Morrill County: RICHARD M. VAN STEENBERG, JUDGE. *Reversed and remanded with directions.*

James L. Macken, for appellants.

Wright, Simmons & Harris, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is a suit by a landowner and his wife to enjoin the defendants from giving effect to an order of the county superintendent of schools detaching certain lands of plaintiffs from School District No. 50 and annexing such lands to the School District of the city of Bridgeport. The trial court held the proceedings void and granted injunctive relief. The School District of the city of Bridgeport and the members of its board of education have appealed.

The School District of the city of Bridgeport is a

Class III district which we shall hereafter refer to as the Bridgeport district. School District No. 50 is a Class I district which we shall refer to as District 50. The remaining defendants are the members of the board of education of the Bridgeport district, the county superintendent, county clerk, county treasurer, and county assessor of Morrill County, the members of the school board of District 50, and the petitioning legal voters of that district.

The plaintiffs have filed a motion to dismiss the present appeal on the ground that appellants have accepted the judgment of the district court in the present suit by refusing to permit Robert Lindgren, the son of plaintiffs, to attend the high school in the Bridgeport district. The record shows the following: The final decree of the district court in the instant case was rendered on August 20, 1959, and an appeal taken therefrom as hereinbefore stated. On August 29, 1959, the board of the Bridgeport district refused to permit Robert Lindgren to attend the Bridgeport high school. Plaintiffs sought a writ of mandamus against the Bridgeport district to compel it to admit Robert Lindgren to its high school. The Bridgeport district successfully defended the action and a writ of mandamus was denied. No appeal was taken from this judgment. The motion to dismiss is without merit. We point out that a high school district is authorized by statute to refuse admission to any or all nonresident pupils. § 79-4,100, R. R. S. 1943. We point out further that the application of Robert Lindgren to attend Bridgeport high school was tendered on the basis of his being a nonresident pupil which the Bridgeport district board could accept or reject as a matter of discretion under section 79-4,100, R. R. S. 1943. The rejection of the application under this authority cannot be considered an acceptance of the decree in the instant case. It seems to us that if the Bridgeport district had accepted the application of Robert Lindgren as a nonresident pupil,

it would then have taken a position contrary to its position in the instant case that plaintiffs' lands were properly annexed and that plaintiffs thereby became residents of the Bridgeport district. In any event, the situation is such that it cannot be asserted as an estoppel against the Bridgeport district or its school board members to prosecute an appeal, or amount to an acceptance of the decree requiring a dismissal of the appeal.

The plaintiffs contend that there is no proper bill of exceptions in this court and that the only question to be determined is whether or not the pleadings sustain the judgment. As heretofore stated, the decree in this case was rendered on August 20, 1959. No motion for a new trial was filed. The appealing defendants ordered a bill of exceptions within time. Before the bill of exceptions was prepared, and on September 28, 1959, a new statute became effective which authorized this court to prescribe rules for obtaining a bill of exceptions. Such rules were prescribed and they became effective at the same time as the new statute. Admittedly, the procedure followed in procuring a bill of exceptions after September 28, 1959, was in accordance with the new statute and the rules of this court authorized thereby. The plaintiffs assert that the statute in force when the decree was rendered must be followed.

We point out that the new statute, section 25-1140, R. S. Supp., 1959, contains no saving clause. It is urged that the general saving statute, section 49-301, R. R. S. 1943, keeps the old procedure in effect. This contention is without merit. In Lovelace v. Boatsman, 113 Neb. 145, 202 N. W. 418, this court said: "A litigant has no vested right in the mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending, after the enactment becomes effective, is properly triable under the changed method." See, also, Norris v. Tower, 102 Neb. 434, 167 N. W. 728; Department of Banking

v. Hedges, 136 Neb. 382, 286 N. W. 277; Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N. W. 2d 533. The general saving clause found in section 49-301, R. R. S. 1943, providing that the repeal of a statute shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, does not save to a party the procedures of the repealed law. The general saving statute relates to substantive and not procedural law. Lovelace v. Boatsman, *supra;* Ensley v. State, 4 Okl. Cr. 49, 109 P. 250; Wheelock v. Myers, 64 Kan. 47, 67 P. 632.

Plaintiffs rely primarily on Cozad v. McKeone, 149 Neb. 833, 32 N. W. 2d 760. That case is clearly not applicable. The final order appealed from in that case was rendered at a date subsequent to the effective date of the amendatory statute. We held that the procedures of the new statute applied to the appeal from such a final order and that a bill of exceptions should have been procured under the law in effect when the final order was rendered. The case has no application to a state of facts such as we have in the present case. The bill of exceptions was properly procured and is here for consideration by the court.

Plaintiffs further contend that no motion for a new trial having been filed the only question before the court is the sufficiency of the pleadings to sustain the judgment. Such is not the law. It has been the consistent holding of this court that in an equity action a motion for a new trial is required to secure a review of rulings of the trial court on alleged errors occurring at the trial, such as rulings on the rejection or reception of evidence. It is required for no other purpose. See, Timmerman v. Timmerman, 163 Neb. 704, 81 N. W. 2d 135; Rush v. Heinisch, 157 Neb. 545, 60 N. W. 2d 608; Nemetz v. Nemetz, 147 Neb. 187, 22 N. W. 2d 619.

Prior to February 6, 1958, plaintiffs were the owners of certain described lands in District 50. On or before that date a petition was circulated among the voters of

District 50 seeking to detach certain lands, including those of plaintiffs, from District 50 and to annex such lands to the Bridgeport district. A sworn list of all the voters in District 50 was attached to such petition. The petition contained signatures in excess of 55 percent of all the voters of District 50. On February 13, 1958, the board of the Bridgeport district accepted the lands described in the petition, and on March 31, 1958, it filed its petition with the county superintendent for a change in the boundary of its district by including the lands described in the petition circulated among the voters of District 50. The petition signed by the voters of District 50 was submitted to the county committee for school district reorganization on February 11, 1958, and was submitted by that committee to the state committee on the same date. The proposal was reviewed by both committees. The county committee, after a published notice of the meeting, held a public hearing. Ten days thereafter the petitions were filed with the county superintendent who, after publishing a notice of hearing, held a hearing to determine the validity and sufficiency of the petitions. Following such hearing the county superintendent on April 15, 1958, made an order by noting the following on the back of the petitions as follows: "Date Granted, April 15, 1958. Date Entered In The Record April 15, 1958. Emma B. Hoppel, County Superintendent of Schools." No proceeding was had to review the order made by the county superintendent.

The plaintiffs contend that the order of the county superintendent was insufficient and void in not meeting the requirements of section 79-402, R. R. S. 1943, which provides in part: "The county superintendent shall then advertise and hold a hearing to determine the validity and sufficiency of the petitions. Upon determination, as a result of the hearing, that valid signatures of at least fifty-five percent of the qualified legal voters of each district are contained in the respective peti-

tions, the county superintendent shall proceed to effect the changes in district boundary lines as set forth in the petitions. * * * Provided, changes affecting cities, villages, or Class III school districts may be made upon the petition of the school board or the board of education of the district or districts affected; * * *."

The defendants maintaining this appeal contend that the granting of the petition by the county superintendent in the manner that she did is valid and binding. We agree that it is. In State ex rel. Tanner v. Warrick, 106 Neb. 750, 184 N. W. 896, we said: "It was held in Biart v. Myers, 3 Neb. (Unof.) 196, that, while a superintendent of public instruction acts judicially in forming a new school district from territory embraced within the boundaries of other districts, it does not follow that his findings and orders in the premises must be entered with all the formality of a judgment of a court of law; if the record shows a substantial compliance with the statute it is sufficient. There is no time or place fixed by the statute for the declaration of approval by the county superintendent; it is enough that the approval be made, and it should, of course, be shown in writing within a reasonable time after the declaration is made; but the essential thing is the approval, which is a mental act, and the declaration, either oral or written, which is physical. The mental determination would be insufficient if unaccompanied by any act evidencing that it had been made; but, when made and declared, it becomes effective, notwithstanding the fact that the written evidence was not recorded until later. While the statute in terms does not require the recording of the act, the proper conduct of official affairs requires that such a record be made." See, also, Biart v. Myers, 3 Neb. (Unoff.) 196, 91 N. W. 573; School Dist. No. 49 v. School Dist. No. 65-R., 159 Neb. 262, 66 N. W. 2d 561.

The order of the county superintendent being valid and final, it may not be collaterally attacked as to any matter properly determined by it. Any dissatisfied

person who is aggrieved by the order made may have it reviewed by error proceedings to the district court. But such person may not stand by and permit the order to become final and thereafter attack the order collaterally on grounds that were available in an error proceeding. The bringing of an injunction suit to enjoin the enforcement of the order is a collateral attack upon it and is not available unless the order was wholly void and not merely erroneous. State ex rel. Larson v. Morrison, 155 Neb. 309, 51 N. W. 2d 626; Cacek v. Munson, 160 Neb. 187, 69 N. W. 2d 692; School Dist. No. 49 v. Kreidler, 165 Neb. 761, 87 N. W. 2d 429.

The finding of the county superintendent is equivalent to a finding that every fact essential to jurisdiction has been found to exist. It includes a determination that 55 percent of all the voters of District 50 had signed the petition. Such order is not therefore subject to collateral attack by injunction on this ground if the petitions are not void on their face.

The record shows that a petition was filed with the county superintendent to which was attached a sworn list of all the voters of District 50. The petition contained the names of persons totalling in excess of the 55 percent of all the voters of District 50. There was some discrepancy in names, but, after notice and hearing, the county superintendent found that 55 percent of the voters of District 50 had signed the petition and made the order granting the petition. This determination is final and not subject to collateral attack.

It is contended that the circulators of the petition misrepresented the facts and fraudulently induced voters to sign the petition. We point out, however, that no evidence was offered in this suit in support of the allegations of fraud contained in the last amended petition. There is therefore no issue of fraud presented by this appeal.

Plaintiffs contend the proceedings and order were void for several reasons. The first contention is that

the language of section 79-402, R. R. S. 1943, requires that the lands detached from one district and annexed to another must be treated as a district and, in the absence of a third petition signed by 55 percent of the voters of such third district, the order purporting to transfer the lands to another district is void. We do not sustain this contention. The pertinent language of section 79-402, R. R. S. 1943, is: "The county superintendent shall * * * change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected." The districts affected are the school districts whose boundaries will be changed. This interpretation of the language "each district affected" appears to have been decided in Cowles v. School District No. 6, 23 Neb. 655, 37 N. W. 493, wherein it is said: "In other words, it is the district in its entirety, before the change of boundary from which the petition is to come, and one-third of the legal voters of which must sign it."

The laws of this state leave the control of the boundaries of school districts with the legal voters of each district. After the original organization of a school district no new district can be formed, old one altered, or the boundaries changed unless such action is initiated by the required percentage of voters in the school districts involved. School Dist. No. 49 v. Kreidler, *supra*. While it is true in the instant case that none of the voters in District 50, who lived on the lands being transferred to the Bridgeport district, signed the petition, the control of the boundaries of District 50 is left with the required majority of all the voters of that school district. No petition is required from the voters in the area or territory being transferred.

Plaintiffs allege that the petition is fatally defective in that it fails to specify the disposition to be made of the assets and unbonded indebtedness of District 50. In this respect, section 79-402, R. R. S. 1943, provides in part: "When a district is divided by petitions, said peti-

tions shall specify the disposition to be made of assets and unbonded indebtedness of the districts; Provided, the remaining portion of an original district divided through annexation shall retain the identity, assets, and unbonded obligations of the original district." It appears clear to us that the present case is within the proviso of the quoted portion of the statute. As a matter of law, District 50 retains its identity, and the assets and unbonded obligations of such district. It being fixed by law, it would be a vain thing to require a statement of the division of assets and unbonded obligations in the petition when no division thereof is permitted. For us to hold that such a statement is necessary to avoid a holding of invalidity would be to invalidate the petition for not stating a provision of law which everyone is presumed to know. We hold that a petition initiated under section 79-402, R. R. S. 1943, for detaching lands from one district and annexing them to another does not require a provision specifying the disposition of assets and unbonded indebtedness since such disposition is made by law.

It is asserted that the transfer of lands from District 50 to the Bridgeport district would result in funds raised by taxation on land in one district being distributed and used in another district, and is therefore unconstitutional. It is fundamental, of course, that tax funds raised in one district for school purposes may not be used in another district. Peterson v. Hancock, 155 Neb. 801, 54 N. W. 2d 85. But that is not the situation here.

The fixing of boundaries of school districts is a legislative function. The Legislature may, in the exercise of its control over school district boundaries, provide a method for changing such boundaries, and the method provided may properly authorize such change to be initiated by petition of the required percentage of the voters of the district. Such a method must, however, provide a means for determining whether the proposed change in boundaries is for a public purpose, and a means

by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N. W. 2d 566. In the instant case the Legislature has provided a method for transferring lands from one school district to another. It has provided for notice and hearing before the county superintendent, which hearing is judicial in character, and which may be reviewed by error proceedings to the district court. This constitutes due process of law. The fact that lands being transferred from one school district to another may thereby be subjected to a higher rate of taxation poses no question of unconstitutionality since the transfer has been made by a means consistent with due process. Nor does the fact that the school district from which the lands were detached retains tax funds, previously levied and collected, affect the validity of the transfer. A voter or taxpayer of a school district has no interest in the tax funds of a district other than to see that they are used for the public purpose for which they were levied. The provision that tax funds previously levied and collected shall remain the property of the district remaining after the proper transfer of a part of its lands to another school district is clearly within the province of the Legislature. State ex rel. School Dist. v. Ellis, 160 Neb. 400, 70 N. W. 2d 320; City of Fremont v. Dodge County, 130 Neb. 856, 266 N. W. 771.

It is contended that the proceedings are void in that the state committee on reorganization did not have its report before the county committee on reorganization at the time it held its hearing on the proposal to transfer the lands in question. Such report was filed with the county superintendent when the hearing was held to determine the sufficiency of the petitions. We point out that the consideration of the proposal to transfer lands by the state and county committees is advisory only. Such committees have no part in determining whether or not the transfer shall be made other than to make

recommendations thereon. The failure of the state committee to make its recommendations prior to the time the county committee met is an irregularity only where it is shown that such report was on file with the county superintendent at the hearing at which the transfer was approved. This is an irregularity that could have been raised by an error proceeding, and which affords no basis for a collateral attack.

Complaint is made also that the petition of the members of the Bridgeport district was not filed until March 31, 1958. This was a date prior to the hearing before the county superintendent. The record shows that the proposed transfer to the Bridgeport district was accepted by its school board on February 13, 1958, but that the formal petition was not filed until March 31, 1958. This is also an irregularity that may not be collaterally attacked.

It is next contended that the notice of hearing given by the county superintendent was insufficient and voids the proceedings in that personal service was not had upon the plaintiffs, pursuant to sections 25-520.01 to 25-520.04, R. S. Supp., 1957. The applicable portion of section 25-520.01, R. S. Supp., 1957, provides: "In any action or proceeding of any kind or nature * * * where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post-office address are known to him." Are the plaintiffs persons having a direct legal interest within the meaning of this statute? We think not. We point out that plaintiffs, as the owners of land being transferred to another school district, do not have a direct legal interest in the fixing of school district boundaries. As to that matter, 55 percent of the voters of District 50 have

the authority to change the boundaries of the district, irrespective of the views of the minority. Even though a minority voter may have the right to test the regularity of the proceedings by review in the district court and to attack such proceedings collaterally if they be entirely void, such voter cannot be said to have the direct legal interest contemplated by the cited sections of the statute. It is a right that is common to every voter and taxpayer in the district to see that the proceedings are in conformity with the statute. In section 25-520.02, R. S. Supp., 1957, the Legislature defined the action or proceeding to which section 25-520.01, R. S. Supp., 1957, applied. It is there said: "The term action or proceeding means all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement." The implications of this section are that matters of general concern to all taxpayers, such as the levy and assessment of property for general tax purposes, are not within the purview of this section. The statute means that it has application to matters of a direct interest to a taxpayer which is not common to all other taxpayers, and to the equalization of special assessments and the assessing of the cost of any public improvement. The statute does not contemplate that personal notice must be given to a class, such as voters or taxpayers in a political subdivision, on matters of general public concern, unless the member or members of the class are personally affected by the proceeding in a manner different from all the voters or taxpayers of the political subdivision, except as specifically provided by the statute. The changing of school district boundaries is a matter of policy which is purely legislative in character. It does not involve matters of direct legal interest to the individual voters or taxpayers of a school district. We conclude that the voters or taxpayers of

a school district do not have such a direct legal interest in the transfer of lands from one district to another as to require personal notice to each under the provisions of sections 25-520.01 to 25-520.04, R. S. Supp., 1957.

Other matters are raised which, in view of our holdings herein, we do not deem necessary to decide.

The record discloses that there was no genuine issue of fact to be determined and that the case was a proper one to be resolved by motion for a summary judgment. The plaintiffs and the appealing defendants each moved for summary judgment. On the basis of the holdings herein made, the trial court erred in sustaining the motion of the plaintiffs for summary judgment and in denying that of the appealing defendants. The judgment of the district court is reversed and the cause remanded to the district court with directions to overrule the motion of plaintiffs for summary judgment and to sustain the motion of the appealing defendants for such a judgment. The costs of this appeal are taxed to the plaintiffs.

REVERSED AND REMANDED WITH DIRECTIONS.

L. G. SCUDDER, APPELLEE, V. COUNTY OF BUFFALO, APPELLANT.
102 N. W. 2d 447

Filed April 15, 1960. No. 34743.

1. **Taxation: Appeal and Error.** One who concludes that his property has been excessively valued for taxation must apply to the county board of equalization to correct the error and, in case of an adverse determination, appeal therefrom.
2. ———: ———. Such remedy, provided by sections 77-1501 to 77-1513, R. R. S. 1943, is full, adequate, and exclusive.
3. ———: ———. Where property is excessively valued for taxation, or if prejudicial errors and irregularities intervened in the procedure of the county board of equalization, the statute affords a plain, adequate, speedy, and exclusive remedy which cannot be collaterally attacked unless the assessment or some part thereof is wholly void.

4. **Judgments.** The purpose of the Uniform Declaratory Judgments Act is to provide a procedure for the speedy determination of issues which would otherwise be delayed to the possible injury of the parties if the ordinary course of judicial proceedings is followed. It creates no new causes of action and provides no cumulative remedies, although the act is remedial in character.
5. ———. Ordinarily an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Reversed and remanded with directions.*

Robert A. Munro and *Charles H. Beatty,* for appellant.

Dier & Barton, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for a declaratory judgment in which plaintiff prays for an adjudication of the rights of the parties growing out of an alleged mistake in the assessment of plaintiff's property for the years 1956 and 1957. The defendant denied generally and asserted that plaintiff was not entitled to relief under the Uniform Declaratory Judgments Act on the facts stated in the petition. The trial court found for the plaintiff and defendant has appealed.

There is no bill of exceptions filed in this case. The only question before the court is whether or not the judgment is supported by the pleadings. The facts alleged in the petition will be accepted as true in making this determination.

The facts are: On March 1, 1956, and March 1, 1957, plaintiff was the owner of certain real estate described in the petition upon which plaintiff had constructed an elevator for the storage of grain. The county assessor of the defendant county assessed the property for tax purposes for 1956 and 1957 in the amount of $630,585.

In making an assessment of the property in 1958, it was discovered that an error had been made by the county assessor in the years 1956 and 1957 as to the volume, size, character, context, and equipment on the premises and, but for such mistake, the assessed value should have been $438,060 and $429,120, respectively, for those years. It is upon these admitted facts that the trial court ordered a correction of the mistakes and a reduction of the assessed valuations on plaintiff's property for 1956 and 1957 as if no mistakes had been made.

It is a fundamental rule of tax law in this state that relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property. The remedy thus given is full, adequate, and exclusive. Hall v. Moore, 75 Neb. 693, 106 N. W. 785; Power v. Jones, 126 Neb. 529, 253 N. W. 867; Homan v. Board of Equalization, 141 Neb. 400, 3 N. W. 2d 650; Gamboni v. County of Otoe, 159 Neb. 417, 67 N. W. 2d 489. The claim that property is assessed too high for taxation purposes cannot be made, in the first instance, by direct application to any other body or by a collateral attack in law or equity, in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. Gamboni v. County of Otoe, *supra*.

A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. The rule is sometimes stated in our cases that the assessment must be void, or the result of willful discrimination or other fraudulent conduct of the assessing officers. No willful discrimination or fraud is here asserted, and we make no further reference to them. An overassessment is an erroneous assessment but not a void one. Boettcher v. County of Holt, 163 Neb. 231, 79 N. W. 2d 183. The statutes of this state, sections 77-1501 to 77-1513, R.

R. S. 1943, provide a complete and adequate remedy which, if not pursued, results in a final determination of the value of the property for taxation purposes unless the assessment is entirely void. S. S. Kresge Co. v. Jensen, 164 Neb. 833, 83 N. W. 2d 569. We necessarily conclude that an error in an assessment of property for taxation purposes, whether it be one of judgment or compilation, can be corrected only by the exclusive method provided by statute and, unless void, it cannot be collaterally attacked. See, Western Union Telegraph Co. v. Douglas County, 76 Neb. 666, 107 N. W. 985; Boettcher v. County of Holt, *supra*. The plaintiff not having availed himself of the statutory remedy provided cannot maintain the present action which is, in effect, a collateral attack upon the assessment made.

The plaintiff contends that the declaratory judgment act provides for a declaration of rights and status where the record shows a plain mistake in the appraisal and assessment of property. We do not agree with this contention. The act does not create a new cause of action where one did not previously exist. The purpose of the act is to provide a method for having issues speedily determined which would otherwise be delayed to the possible injury of those interested, if they were compelled to await the ordinary course of judicial proceedings. Stewart v. Herten, 125 Neb. 210, 249 N. W. 552. Where an exclusive remedy is provided, the declaratory judgment act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy. In fact, the general rule is that an action for a declaratory judgment will not be entertained when another equally serviceable remedy has been provided. Stewart v. Herten, *supra*. It certainly was never intended as a cumulative remedy to one who has failed to pursue a full, adequate, and exclusive remedy.

The plaintiff contends that section 77-1735, R. R. S.

1943, does not provide an adequate remedy and that this justifies relief under the declaratory judgment act. We think the foregoing section provides an exclusive remedy for recovering taxes paid where the tax was levied or assessed for an illegal or unauthorized purpose. Loup River Public Power Dist. v. County of Platte, 144 Neb. 600, 14 N. W. 2d 210. In the absence of such statutory provision, taxes voluntarily paid cannot be recovered back. Riggs-Orr Investment Co. v. City of Omaha, 130 Neb. 697, 266 N. W. 430. We have no such situation here. The tax before us was not levied for an illegal or unauthorized purpose. The plaintiff's claim is based on a mistake of the county assessor in compiling and determining the assessed value of the property. It is not a claim for a refund under section 77-1735, R. R. S. 1943, since the taxes have not been paid. We conclude that no rights have arisen under this section which are subject to declaration by declaratory judgment. The exclusive statutory remedy may not be circumvented by invoking the provisions of the declaratory judgment act. While the act does authorize a declaration of rights, status, and other legal relations whether or not further relief is or could be claimed, it may not declare rights to exist which are grounded on unfulfilled conditions precedent with which the plaintiff may or may not be able to comply. It is fundamental, we think, that until such conditions precedent have been complied with, the remedy does not exist. Under such a situation, the plaintiff has no accrued rights under this section of the statutes that can be determined by the declaratory judgment act. The fact that plaintiff asserts that the exclusive remedy provided by section 77-1735, R. R. S. 1943, is not adequate to meet the situation which confronts him, does not authorize the use of the declaratory judgment act, as we have heretofore defined the purpose of that act, as a cumulative remedy.

The petition in the instant case does not state facts

entitling plaintiff to any relief. The judgment of the trial court is not therefore supported by the pleadings. The judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. KELLEY COOMES, DEFENDANT IN ERROR.
102 N. W. 2d 454

Filed April 15, 1960. No. 34750.

1. **Constitutional Law: Criminal Law.** In all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation.
2. ———: ———. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.
3. **Criminal Law.** In this state all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
4. ———. There are no common law crimes in this state, and we only resort to common law definitions where general terms are used to designate crime.
5. **Breach of the Peace.** A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community.
6. ———. Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.
7. **Indictments and Informations.** An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto

and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.

ERROR to the district court for Sheridan County: ALBERT W. CRITES, JUDGE. *Exception overruled.*

Lawrence E. Mitchell, for plaintiff in error.

Charles A. Fisher, for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an error proceeding docketed in this court by the county attorney of Sheridan County, pursuant to leave granted, taking exception to the ruling of the district court for Sheridan County in the prosecution of a cause therein under section 28-818, R. R. S. 1943. See § 29-2315.01, R. S. Supp., 1959.

On September 14, 1959, the county attorney of Sheridan County filed in the district court for Sheridan County an information against Kelley Coomes. The part of said information that is here material is as follows: "* * * that Kelley Coomes * * * did, on the 26th day of August A. D. 1959, in the County of Sheridan and State of Nebraska aforesaid, wilfully and unlawfully disturb the peace and quiet of persons, families and the neighborhood, Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Nebraska."

Section 28-818, R. R. S. 1943, under and pursuant to which said charge was filed, provides: "Every person who shall willfully disturb the peace and quiet of any person, family or neighborhood, shall upon conviction thereof be fined in any sum not exceeding one hundred dollars or be imprisoned in the county jail not exceeding three months."

Defendant Coomes filed a demurrer to the information which, insofar as here material, alleged: "* * * demurs to the information because it does not state

facts that constitute an offense punishable by the laws of this state, because the statute Section 28-818, R. R. S. under which the suppoed (sic) offense is charged is unconstitutional and void, because it is so vague and indefinite, so uncertain and ambiguous, that it does not meet the definition of disturbing the peace at common law, and that it does not any where charge a breach of the peace or provide that a breach of the peace is an essential element of the charge, and because the same shows on the face that intent to create a breach of the peace is not alleged, proof of the same being necessayr (sic) to make out offense of disturbing the peace and disorderly conduct or breach of the peace."

The trial court sustained this demurrer, giving the following reason for doing so: "The defendant then instanter filed his demurrer to the information, and the Court having heard argument thereon and being fully advised in the premises finds that the same is well taken and should be sustained because the said information fails to specify the acts constituting the offense charged therein, but finds that the statute under which prosection (sic) is brought is not unconstitutional and void as urged by the defendant. The Court finds that the information charges almost exactly in the words of the statute same being 28-818, R. S, 1943, but that regardles (sic) thereof it, the information, is not sufficient and that the demurrer is sustained and the cause dismissed.

"It is therefore Ordered and Adjudged that the demurrer of the defendant Kelly Coomes to the information filed herein charging him under Section 28-818 R. R. S. 1943 in almost exact statutory words, is sustained and the cause dismissed and the defendant Kelley Coomes is hereby discharged * * *."

The title to L. B. 461, which authorizes this procedure and under and pursuant to which it was taken, states it is: "An Act * * * to provide in criminal cases on application of the county attorney for review by the

Supreme Court on error proceedings of any ruling or decision of the district court adverse to the State of Nebraska; * * *." Laws 1959, c. 121, p. 453. Consequently the question of the constitutionality of section 28-818, R. R. S. 1943, is not properly before this court but only the question of whether or not the information is insufficient because it "fails to specify the acts constituting the offense charged therein."

Article I, section 11, of the Constitution of the State of Nebraska, provides, insofar as here material, that: "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of accusation, * * *."

"Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111. See, also, Dutiel v. State, 135 Neb. 811, 284 N. W. 321.

"In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." Dutiel v. State, *supra.*

In Kinnan v. State, 86 Neb. 234, 125 N. W. 594, 27 L.R.A.N.S. 478, we said: "* * * there are no common law crimes in this state, and we only resort to common law definitions where general terms are used to designate crime." See, also, Fredericksen v. Dickson, 148 Neb. 739, 29 N. W. 2d 334.

A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. See, State v. Clark,

64 W. Va. 625, 63 S. E. 402; State v. Long, 88 W. Va. 669, 108 S. E. 279; People v. Bartz, 53 Mich. 493, 19 N. W. 161; Fischbach v. Ohio State Racing Commission, 76 Ohio L. A. 540, 147 N. E. 2d 258; People v. Parker, 208 Misc. 978, 138 N. Y. S. 2d 2; Flores v. City and County of Denver, 122 Colo. 71, 220 P. 2d 373; Woods v. State, 152 Tex. Cr. 338, 213 S. W. 2d 685; City of St. Louis v. Slupsky, 254 Mo. 309, 162 S. W. 155, 49 L.R.A.N.S. 919.

Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof. See, Faulkner v. State, 166 Ga. 645, 144 S. E. 193; Miles v. State, 30 Okl. Cr. 302, 236 P. 57, 44 A. L. R. 129; State v. Long, *supra;* City of Plattsburg v. Smarr (Mo. App.), 216 S. W. 538; State v. White, 18 R. I. 473, 28 A. 968; State v. McCoy, 99 Ohio App. 161, 131 N. E. 2d 679; State v. Wixon, 118 Vt. 495, 114 A. 2d 410; People v. Parker, *supra;* Woods v. State, *supra;* State ex rel. Thompson v. Reichman, 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B 889; City of St. Louis v. Slupsky, *supra.*

"The information must expressly and directly state each fact that is an essential element of the crime intended to be charged so that the accused will not be required to go beyond the information to learn the nature of the charge against him or the issue he must meet. * * *." Benedict v. State, 166 Neb. 295, 89 N. W. 2d 82. See, also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

"In charging the commission of an offense in an information it is not necessary that the exact words of the statute be used, provided the words employed are the equivalent in meaning of those contained in the statute." Benedict v. State, *supra.* See, also, Fredericksen v. Dickson, *supra;* Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

"Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to

describe such crime in the language of the statute." Sedlacek v. State, *supra*. See, also, Fredericksen v. Dickson, *supra*.

"An indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish, and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication." Sedlacek v. State, *supra*. See, also, Fredericksen v. Dickson, *supra;* Cowan v. State, *supra*.

"An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense." Benedict v. State, *supra*. See, also, Spreitzer v. State, *supra;* Pauli v. State, 151 Neb. 385, 37 N. W. 2d 717; Anderson v. State, 150 Neb. 116, 33 N. W. 2d 362.

As stated in 42 C. J. S., Indictments and Informations, § 139(d), p. 1040: "Accused must be apprised of the crime charged with reasonable certainty, and if the language of the statute is insufficient for this purpose further averments of the facts and circumstances must be made." And, as stated in § 139(e) thereof, p. 1042: "Such averments as to time, place, person, and other circumstances as are necessary to identify the particular transaction are, of course, necessary."

In 11 C. J. S., Breach of the Peace, § 8, p. 821, the requirements, in this regard, are set out as follows: "In accordance with the general rules, a complaint, information, or indictment for a breach of the peace must set forth specific acts constituting the offense. If the offense is a statutory one, the complaint, information, or indictment must follow closely all the statutory essentials

of the offense. Where the words of the statute are fairly descriptive of the offense, it may be sufficient to charge the offense in the language of the statute, or to aver the fact of its commission generally without specifying the words or describing the acts. Where, however, the statute does not contain words sufficient to define any offense, it is not sufficient to charge the crime in the general language thereof, but in such cases the particular language or conduct on which the offense is predicated must be set forth in order that the court may judge whether or not a breach of the peace has been committed."

In the absence of allegations in the information as to specifically what defendant did that willfully disturbed the peace and quiet of some person, family, or neighborhood, where the act or acts took place, and what person, family, or neighborhood they disturbed the peace and quiet of, it is hard to see how the defendant could prepare his defense thereto and how a judgment rendered thereon could constitute a bar to a later prosecution for the same offense if sought to be used for that purpose.

In view of what we have said and held herein, we find the exception taken by the county attorney to the trial court's ruling to be without merit and the same is overruled.

EXCEPTION OVERRULED.

ROBERT L. HAINES, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
102 N. W. 2d 609

Filed April 22, 1960. No. 34655.

1. **Indictments and Informations.** Where a statute states the elements of a crime, it is generally sufficient, in an information, to describe such crime in the language of the statute.
2. ———. If the information apprises the defendant with reason-

able certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information as well as constitutional requirements.

3. **Embezzlement.** The provisions of section 28-543, R. R. S. 1943, were enacted to prevent any public official from converting any public money received by him in his official capacity to his own use or from using it for any purpose other than the one for which the money was entrusted to him, and the offense provided in said section is committed by such violation of the statute, whether or not the public official fraudulently intended to do so.
4. **Justices of the Peace: Embezzlement.** A report and payment of fines collected by a justice of the peace, which is not made by him until after a shortage and conversion thereof to his own use has been discovered and exposed, is not a defense to a prosecution under the provisions of section 28-543, R. R. S. 1943.
5. **Criminal Law: Trial.** Ordinarily, when error is predicated upon the claim that counsel in addressing the jury prejudicially abused his privilege, the objectionable remarks, in order to be available on appeal, must have been properly objected to at the time they were made or at the conclusion of counsel's statement or argument, and an adverse ruling had thereon before submission to the jury.
6. ———: ———. It is generally the rule that a prosecutor, in argument to the jury, may state proper conclusions which are predicated upon competent evidence which will be or has been adduced, and unless an error in argument complained of was prejudicial to the rights of defendant, the judgment should not be reversed.
7. **Criminal Law: Evidence.** While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation.
8. **Juries: Appeal and Error.** It is not the province of this court in law actions to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.
9. **Criminal Law.** In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

ERROR to the district court for Buffalo County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Kelly & Kelly, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Robert L. Haines, hereinafter called defendant, was charged in an amended information filed January 29, 1959, in the district court for Buffalo County with converting to his own use and embezzlement of public money while serving from February 1, 1956, to August 25, 1958, as a justice of the peace of Buffalo County. The information contained six separate counts. The first five counts each separately charged in substance that defendant, while serving as such justice of the peace, "unlawfully and feloniously and fraudulently" converted to his own use and embezzled in Buffalo County specified sums of money paid to him as fines by named persons, at specified times, as follows: Count I, $57; Count II, $45; Count III, $90; Count IV, $20; and Count V, $20. Count VI likewise charged that defendant converted to his own use and embezzled not less than $4,618, paid to him as fines exclusive of Counts I through V, between February 1, 1956, and May 31, 1958.

Upon arraignment, defendant was present in court with his own counsel, whereat the information was read in full to defendant, and the trial court asked defendant separately as to each count and as to the information as a whole how he wished to plead thereto. Thereupon, defendant personally stated to the court that he stood mute as to each count separately and as to the information as a whole, whereupon as to each count separately and as to the information as a whole, the

court entered a plea of "Not Guilty" on defendant's behalf.

After consultation with attorneys for the State and defendant, the case was set for trial Tuesday, March 17, 1959, at 10 a. m., and trial to a jury, with defendant and his own counsel present, was commenced on that date. At conclusion of the State's case, and again at conclusion of all the evidence, defendant's counsel moved for dismissal or acquittal of defendant for alleged insufficiency of the evidence to support a conviction of the crimes charged. Such motions were overruled, and after the issues were submitted to a jury, it returned a verdict finding defendant guilty on each and all of the separate counts charged in the information and finding that the amount of money converted by defendant to his own use and embezzled by him in each count was as follows: Count I, $57; Count II, $45; Count III, $90; Count IV, $20; Count V, $20; and Count VI, $1,360. Thereafter, defendant's motion for new trial was overruled, and he was sentenced to serve a term of not less than 3 nor more than 6 years in the Nebraska Reformatory for Men upon each of the six counts of the information. However, the sentences were ordered to run concurrently and not consecutively. Defendant was also sentenced to pay a fine on each of the separate counts as follows: Count I, $114; Count II, $90; Count III, $180; Count IV, $40; Count V, $40; and Count VI, $2,720, together with costs of prosecution on each and all counts.

Thereafter, defendant prosecuted error to this court, assigning in substance: (1) That the information was defective and did not charge defendant with commission of the crimes alleged as provided by the statute; (2) that the trial court erred in admitting certain evidence relating to a possible violation of other laws not connected with the issues in the case at bar, and erred in permitting the county attorney, over objections of defendant, to make prejudicial opening statements to the

jury with relation thereto; and (3) that the verdict returned by the jury was not sustained by sufficient evidence. We do not sustain the assignments.

Defendant also assigned that: "The court erred in permitting the introduction of many pieces of evidence which were either incompetent or irrelevant, or for which there had not been proper or sufficient foundation laid." That assignment is disposed of without further discussion by Pulliam v. State, 167 Neb. 614, 94 N. W. 2d 51.

Defendant also assigned that: "The court erred in instructing the jury on vital issues to be resolved by said jury." However, such purported assignment is so indefinite and incomprehensible that this court will not search the record and attempt to discuss or answer it directly.

Section 28-543, R. R. S. 1943, upon which the information was predicated, provides, as far as important here, that: "If any officer * * * charged with the collection, receipt, safekeeping, transfer or disbursement of the public money, or any part thereof, belonging to the state or to any county or precinct * * * in this state, shall convert to his own use, or the use of any other person * * * in any way whatever, * * * any portion of the public money * * * received, controlled or held by him for safekeeping, transfer or disbursement, * * * every such act shall be deemed and held in law to be an embezzlement of so much of such moneys * * * as shall be thus converted, * * * which is hereby declared to be a high crime. Such officer * * * shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money * * * so embezzled, which fine shall operate as a judgment at law * * * and shall be enforced to collection by execution or other process for the use only of the party or parties whose money or other funds * * * of any kind as aforesaid have been

so embezzled. In all cases, such fine so operating as a judgment shall only be released or entered as satisfied by the party in interest as aforesaid." The remaining portion of section 28-543, R. R. S. 1943, relates solely to recited conditions and situations of failure or refusal of a public official to pay over any public money or make settlement thereof within a reasonable time after notice or demand, which "shall be held and taken as prima facie evidence of such embezzlement." In that respect, such provisions are generally held to be evidentiary in character for protection of the public and are generally held not to be necessary elements of the offenses required to be alleged or proved by the state. See 29 C. J. S., Embezzlement, § 11, p. 686, citing authorities from this and other jurisdictions.

Defendant first argued that Count VI of the information was defective because it charged that defendant had converted to his own use and embezzled a specified sum of money between two dates, to wit, February 1, 1956, and May 31, 1958, during defendant's term of office. That contention has no merit because it is entirely answered and refuted by Bolln v. State, 51 Neb. 581, 71 N. W. 444, and Heilman v. State, 109 Neb. 15, 189 N. W. 303. See, also, Canada v. Jones, 170 F. 2d 606.

Thereafter, defendant argued that the information was defective because it did not charge defendant with intent to defraud the State of Nebraska or Buffalo County, which was an essential element of the crimes, and that instruction No. 13, given by the trial court, erroneously told the jury in part that: "An intent to convert the money involved to his own use is a necessary element of the crimes charged against the defendant. It is not necessary in a prosecution under the Statute quoted in Instruction No. 2 to prove an intent to defraud in committing the act charged, yet it is necessary to prove an actual knowledge on the part of the one charged thereunder that the act which he is

charged with having committed was committed without authority of law and was wrongful." In that connection, each count of the information alleged among other things that defendant, Robert L. Haines, "did then and there unlawfully and feloniously and fraudulently convert the same to his own use and embezzle of said public money, * * * arising from fines under the general laws of the State of Nebraska, which belong to said County of Buffalo, to be appropriated exclusively to the use and support of the common schools in Buffalo County * * *." It is thereby evident that if intent to defraud were an essential element of the crimes sought to be alleged under section 28-543, R. R. S. 1943, the allegations of the information were more than adequate.

In that connection, we have consistently held that: "Where a statute states the elements of a crime, it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute.

"If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements." Liakas v. State, 161 Neb. 130, 72 N. W. 2d 677. See, also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868.

In that connection, defendant relies upon Davis v. State, 121 Neb. 399, 237 N. W. 297, in arguing that intent to defraud was an essential element of the crimes charged against defendant. In that case, it was charged that defendant, as vice president of a bank, had embezzled private money of the bank under the provisions of section 28-547, R. R. S. 1943, which by its language specifically makes intent to defraud by bank officers an essential element of the crime of embezzlement. On the other hand, section 28-543, R. R. S. 1943, which re-

lates to embezzlement by public officers, does not do so.

As stated in 18 Am. Jur., Embezzlement, § 40, p. 597, citing authorities: "If a statute makes it a felony for a public officer knowingly and unlawfully to appropriate to his own use or to the use of any other person money received by him in his official capacity, it is not necessary, to constitute the offense of embezzlement, that there be an intent to appropriate the money so as forever to exclude the rightful owner from its use and possession. The purpose of the statute is to prevent any public official from using the money or property coming to him in his official capacity for any purpose other than the one for which the money or property was intrusted to him."

In People v. Warren, 122 Mich. 504, 81 N. W. 360, 80 Am. S. R. 582, which involved the interpretation and application of a comparable statute, the court said: "The intention of the statute was to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the purpose for which it came to him. If he does knowingly use it, or permit others to do so, for other purposes than the one for which it was intrusted to him, then he comes within the provisions of the statute."

As stated in 29 C. J. S., Embezzlement, § 12, p. 687, citing authorities: "* * * under some statutes, especially those relating to the embezzlement of public funds, the offense consists in the violation of the statute and not the intent or motive by which the accused is actuated, * * *." See, also, § 35, p. 718.

We conclude that the crime of converting to his own use and embezzlement by a public officer under the provisions of section 28-543, R. R. S. 1943, was meant to prevent any public officer from converting to his own use or using any public money received by him in his official capacity for any purpose other than the one for which the money was entrusted to him, and that the offense consists in such violation of the statute, whether

or not the public official fraudulently intended to do so.

In the case at bar, the trial court properly instructed the jury, in connection with each of the six separate counts and indicated in instruction No. 13 as well, that in order to warrant conviction of defendant, the burden was on the State to prove, among other elements, beyond reasonable doubt that defendant "intentionally converted said money to his own use." Defendant's contentions have no merit.

We turn then to defendant's assignment that the trial court erred in admitting certain evidence relating to a possible violation of other laws not connected with the issues in the case, and in permitting the county attorney to make prejudicial statements with relation thereto. We conclude that such assignment is without merit.

At the beginning of the trial, defendant moved for a mistrial for the reason that: "* * * the county attorney in his opening statement covered material broader than is alleged in said complaint," which contains nothing about "the repayment of any funds at all." Of course, the fundamental issue was the alleged conversion to his own use and embezzlement by defendant of public funds, and as heretofore observed, failure to pay over such funds within a reasonable time after notice or demand was not an element necessary to be alleged in the information or to be proved by the State, if the evidence adduced was otherwise sufficient to establish that defendant had converted public money to his own use, as provided by section 28-543, R. R. S. 1943.

Also, defendant's motion aforesaid did not then call the trial court's attention to or object to any particular statement made by the county attorney, and being so indefinite and unintelligible, it was properly overruled. In that connection, counsel for defendant made no further objection to any purported statement of the county attorney until after the State had rested. At that time, defendant renewed his motion for "a mistrial for the

reason that certain evidence is before the jury that is highly prejudicial to the rights of the defendant * * *." He then offered in evidence the entire "opening statement of * * * County Attorney * * * as to certain matters that were to be proven in this case." Defendant's motion was overruled, whereupon defendant's counsel said, referring to the county attorney's opening statement: "It's not offered as an exhibit." Thus, the exhibit was not admitted. Thereupon, defendant's counsel offered to prove that the county attorney said in his opening statement that: " 'The evidence will show that there was insufficient money in his trust account; that the check bounced,' " which defendant now argues prejudicially related to a possible violation of other laws not connected with the issues in the case. The State objected, and the offer was refused upon the ground that it was incompetent, irrelevant, immaterial, out of time, and not then proper to be received.

In such respect, it is now elementary that ordinarily, when error is predicated upon the claim that counsel in addressing the jury prejudicially abused his privilege, the objectionable remarks, in order to be available on appeal, must have been properly objected to at the time they were made or at the conclusion of counsel's statement or argument, and an adverse ruling had thereon before submission to the jury. See Sandomierski v. Fixemer, 163 Neb. 716, 81 N. W. 2d 142, and authorities cited therein.

It cannot be said that defendant objected in any specific or proper manner at the time the alleged statement was made or thereafter so that the trial court could possibly know what defendant was complaining about. It is also elementary that a prosecutor, in argument to the jury, may state proper conclusions which are predicated upon competent evidence which will be or has been adduced, and unless an error in argument complained of was prejudicial to the rights of defendant, the judgment should not be reversed. See

Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632, and authorities cited. In that connection, also, the trial court instructed the jury that it "should be governed solely by the evidence introduced" and not "by statements of counsel not supported by the evidence." Balis v. State, 137 Neb. 835, 291 N. W. 477, relied upon by defendant herein, is entirely distinguishable from the case at bar.

The evidence objected to by defendant was primarily that of a bank cashier who testified as a witness for the State that defendant's check for $3,200, dated February 10, 1958, by which he sought to pay $3,100 in fines to the county, was not paid when first presented to the bank by the county treasurer for payment because "there wasn't sufficient funds to pay it" so "later that morning" defendant deposited "Ten hundred and sixty dollars" in his "R. L. Haines, Trust Account" and the check was subsequently paid on February 11, 1958. There is evidence also that $780 of the money so deposited by defendant had been borrowed for that purpose. That was the evidence, together with that of the county treasurer and the person from whom the $780 was borrowed by defendant, upon which the county attorney had predicated his opening statement about which defendant complains.

Assuming, as the State has done, that the county attorney made the statement about which defendant complains, we are unable in the light of the foregoing evidence and authorities, to say that the county attorney's opening statement or that the evidence aforesaid relating thereto showed a violation of other laws not connected with the issues in the case which could in any manner have been prejudicial to defendant. The facts sought to be shown and which were properly shown by the aforesaid evidence as well, were that fines collected by defendant which should have been in his trust account in his bank, or otherwise securely available or in his possession so they could be paid

over to the county treasurer by defendant, as required by law, were not on deposit in defendant's trust account at the bank or securely available or in his possession. It was simply circumstantial evidence of the unlawful use of such funds by defendant, and a part of the alleged offense.

Finally, we turn to defendant's assignment that the verdict was not sustained by sufficient evidence. We do not sustain that assignment.

The evidence adduced is so voluminous that we can only summarize relevant and material portions thereof, bearing in mind the rule that: "It is not the province of this court to resolve conflicts in the evidence in law actions, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury.

"In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." Spreitzer v. State, 155 Neb. 70, 50 N. W. 2d 516.

As we view it, there is ample competent evidence in this record to establish and support the following: Defendant was admittedly a duly elected and qualified justice of the peace of Buffalo County from January 1955 until he resigned August 25, 1958. He was a lawyer who had previously served two full terms as county attorney of that county. During the time he was justice of the peace, defendant made some reports of and paid to the county treasurer some fines collected by him as such justice of the peace. On February 8, 1956, he reported receipts in the amount of $3,963, and paid that amount to the county treasurer for fines collected for the year 1955. Thereafter, on February 10, 1958, defendant made a report of fines collected during 1956 and 1957 in the amount of $3,100 which he paid to the county treasurer on February 11, 1958, by a check for

$3,200, which we have heretofore mentioned, and on that same date, the county treasurer remitted to defendant a purported extra $100. On February 22, 1958, defendant reported and paid to the county treasurer fines collected during January 1958, in the amount of $50. On March 19, 1958, defendant made his report to the county treasurer by mail, indicating that his docket reflected no criminal filings for February 1958. On July 7, 1958, because of discrepancies found by auditors, defendant reported and paid $200 as additional fines collected by him during 1956. Also, on December 6, 1958, defendant made an additional report and paid $40 as fines collected by him. In that connection, we should bear in mind that defendant's shortages were discovered when an audit was made during the summer of 1958 by the Auditor of Public Accounts, as requested by the Buffalo County board; that defendant was then notified that discrepancies had been discovered; that on August 25, 1958, one of the auditors asked defendant, "where is the money"; and that thereafter the original information was filed against defendant on September 26, 1958.

In support of Count I, the State's evidence discloses that on January 26, 1956, defendant fined a named person $100. Such person was then unable to pay the fine, so he was committed to the county jail. Thereafter, $57 of such fine was paid to the county sheriff, who paid that amount to defendant by check dated February 14, 1956. However, such sum so received by defendant was not reported or paid to the county treasurer by defendant, as required by law.

In support of Count II, the State's evidence discloses that on January 26, 1956, defendant fined a named person $100. Such person was then unable to pay the fine, so he was committed to the county jail. Thereafter, $45 of such fine was paid to the county sheriff, who paid that amount to defendant by check dated February 14, 1956. However, such sum so received by defendant was not re-

ported or paid to the county treasurer by defendant, as required by law.

In support of Count III, the State's evidence discloses that on March 2, 1956, defendant fined a named person $100. Such person was then unable to pay the fine, so he was committed to the county jail. Thereafter, $90 of such fine was paid to the county sheriff, who paid that amount to defendant by check dated March 26, 1956. However, such sum so received by defendant was not reported or paid to the county treasurer by defendant, as required by law.

In support of Count IV, the State's evidence discloses that on July 13, 1956, defendant fined a named person $15 and costs. Such person was then unable to pay the fine and costs, so he was committed to the county jail. Thereafter, on that day or the next such person paid $20 on his fine and costs to the sheriff, who paid that amount to defendant by check dated July 14, 1956. However, no part of such sum so received by defendant was reported or paid to the county treasurer by defendant, as required by law.

In support of Count V, the State's evidence discloses that on May 31, 1957, defendant fined a named person $20 and costs, who thereupon paid that amount to defendant. However, such fine so received by defendant was not reported or paid to the county treasurer, as required by law.

Count VI charged that defendant had converted to his own use and embezzled the sum of $4,618 paid to him as fines between February 1, 1956, and May 31, 1958, while serving as a justice of the peace of Buffalo County. In that connection, oral testimony of several police officers for the city of Kearney, and several Nebraska Safety Patrol officers, which testimony was supported by their daily records and reports, was properly offered and received. Such testimony and records disclosed arrests of named persons who had been fined by defendant and whose fines had been paid to defendant

either in cash at the time of hearing, or by waiver with cash fines enclosed in stamped addressed envelopes furnished by defendant and mailed to him through the United States mail, or by mail admittedly received by defendant during such period.

Also, the testimony of a state examiner and a state accountant from the office of the Auditor of Public Accounts discloses that they had traced and checked, then retraced and rechecked defendant's records, the records of the police and Nebraska Safety Patrol officers, and the county records as well with relation to the aforesaid arrests and fines imposed by defendant and received by him to determine whether such fines had been reported and paid to the county treasurer. Their testimony established that, with only one $10 exception, none of such fines thus paid to and received by defendant had ever been included in any reports or remittances made by defendant to the county treasurer, and that the amount of such fines unpaid by defendant was $305 plus $1,055, or a total of $1,360.

As requested by the county board of Buffalo County, the Auditor of Public Accounts made an audit of defendant's official accounts as justice of the peace, whereat he discovered discrepancies and reported same to the county board. Thus, on August 25, 1958, a state examiner and state accountant employed by the Auditor of Public Accounts went to defendant's office seeking to learn where the money was that defendant had not reported or paid. Thereupon, defendant reached in his desk and handed the county sheriff $460 cash for safekeeping, saying that it was his 1958 justice of the peace business. Thereafter, such sum was given to then counsel for defendant, and after November 10, 1958, all but $40 thereof, reported by defendant on December 6, 1958, as heretofore mentioned, was turned over to defendant.

Also, on August 25, 1958, defendant resigned as justice of the peace, and thereafter, on November 10, 1958, defendant paid to the county treasurer through his then

counsel the sum of $7,982, purportedly representing fines collected by defendant as justice of the peace and never theretofore reported or paid to the county treasurer. Also, on August 25, 1958, defendant orally admitted to the county attorney that he had used the fines collected by him for his own purposes. Defendant then told the county attorney that he would give a written statement that he had so used fines collected as justice of the peace, and on August 25, 1958, defendant voluntarily gave the county attorney a signed and witnessed statement which said in part that he had "used funds collected by me as Justice of the Peace of Buffalo County * * * for my own personal use, the amount of which moneys so used is not now known to me."

Likewise, on November 10, 1958, defendant filed a petition in this court, requesting and consenting to his disbarment as a lawyer in this state, alleging that he stood "charged in the District Court of Buffalo County with the misappropriation of funds which came into my hands while I was serving as Justice of the Peace in said county" and I "hereby acknowledge such charges to be true and admit that while serving as Justice of the Peace * * * I have been guilty of unprofessional conduct sufficient to warrant the revocation of my license to practice law." Further, this record discloses that acting thereon, this court disbarred defendant on November 14, 1958.

Defendant, as a witness in his own behalf, admitted that he had kept no complete records during the time he was justice of the peace; that they were in a deplorable condition; that he did not know how much money was due for fines collected by him; and that he had not and could not have personally accounted for the amount due. He admitted that he had made a report of fines due through his then counsel on November 10, 1958, which was accompanied by payment of $7,982 for such fines as he had not theretofore reported and paid to the county treasurer. However, defendant insisted

that he had never intended to steal the money.

In that connection, the report and payment of such fines to the county treasurer by defendant after the shortage and conversion thereof to his own use had been discovered and exposed would not be a defense under the provisions of section 28-543, R. R. S. 1943. See Heilman v. State, *supra*.

The State was not required to allege in the information that demand was made for payment of such fines by defendant, and that he had failed to account therefor or make settlement thereof within a reasonable time thereafter. Also, if conversion thereof was sufficiently established by other competent evidence, the State was not required to prove such demand and failure thereafter by defendant in order to support the verdict and judgment. See Bartley v. State, 53 Neb. 310, 73 N. W. 744.

Further, as recently as Olney v. State, 169 Neb. 717, 100 N. W. 2d 838, this court held: "While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation."

We conclude that the verdict of the jury was amply sustained by the evidence; that defendant had an eminently fair and impartial trial; that there is no error in the record prejudicial to defendant's rights; and that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

CORNIEL R. VERMAAS, APPELLANT, V. VERNON E. HECKEL, APPELLEE.

102 N. W. 2d 647

Filed April 22, 1960. No. 34682.

1. **Trial.** Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion.
2. **Negligence: Trial.** Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury.
3. **Evidence.** Admissions in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts, and they are ordinarily classified as judicial and extrajudicial.
4. ———. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
5. ———. A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence.
6. ———. An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission.
7. ———. An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel.
8. **Automobiles.** Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the automobile or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Wagener, Marx & Galter, for appellant.

Chambers, Holland, Dudgeon & Hastings, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Lancaster County. It involves an action brought by Corniel R. Vermaas to recover damages from Vernon E. Heckel because of personal injuries which plaintiff claims he suffered in an automobile accident, which accident, plaintiff alleges, was caused by defendant's negligence. Trial was had and the jury returned a verdict for the defendant. Plaintiff thereupon filed an alternative motion asking the trial court to give him either a judgment notwithstanding the verdict or a new trial. This motion the trial court overruled and the plaintiff has perfected this appeal therefrom. We shall herein refer to the parties as they appeared in the court below.

The accident in which plaintiff claims he was injured happened about 3:45 p.m., on Saturday, October 4, 1958, in the intersection of Twenty-sixth and R Streets in Lincoln, Nebraska. The weather was good and the streets were dry. R Street runs east and west. It is hard surfaced between curbs, which are 40 feet apart. It is an arterial street protected by stop signs between Seventeenth and Twenty-seventh Streets, carrying a maximum speed limit of 35 miles an hour. Twenty-sixth Street runs north and south, having a hard surfaced area between its curbs which are 30 feet apart. There is a 13-foot set-off on Twenty-sixth Street at the intersection, Twenty-sixth Street north of R Street being located 13 feet farther to the west than it is south thereof. There are stop signs on Twenty-sixth Street as it enters R Street at both the northwest and southeast corners of the intersection. Plaintiff was, at the time, riding in a 1949 Plymouth automobile owned by

Elmer L. Keefover and being driven by him north on Twenty-sixth Street. Defendant was, at the time, driving his 1954 Hudson west on R Street. The accident happened at a point in the intersection approximately 6 feet north of the center of R Street when the left front of the Hudson ran into the right rear side of the Plymouth. After the impact the Hudson was standing in the intersection at about the point of the impact, facing west, whereas the Plymouth had skidded sideways, turned around, and ended up just out of the intersection to the north on Twenty-sixth Street. It was near the west curb thereof facing southeast, being some 35 feet from the point of the impact.

Plaintiff suggests the questions involved are as follows: "Did the defendant's judicial admissions establish, as a matter of law, that defendant was guilty of negligence which proximately caused the accident"; and "Did the trial court err in overruling plaintiff's motion for a directed verdict on the question of liability?" It should here be stated that plaintiff moved for a directed verdict against the defendant on the issue of defendant's liability after both parties had rested, which motion the trial court overruled. Plaintiff assigns as error the court's ruling doing so.

"Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion." Nebraska Transfer Co. v. Chicago, B. & Q. R. R. Co., 90 Neb. 488, 134 N. W. 163. See, also, Swanback v. Sovereign Camp, W. O. W., 103 Neb. 34, 170 N. W. 354.

"A motion for directed verdict or for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact

resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence." Stark v. Turner, 154 Neb. 268, 47 N. W. 2d 569. See, also, Anderson v. Evans, 164 Neb. 599, 83 N. W. 2d 59.

However, as stated in Kipf v. Bitner, 150 Neb. 155, 33 N. W. 2d 518: "Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence, and the degree thereof, when one is compared with the other, such issues must be submitted to the jury." See, also, Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557.

Plaintiff contends the facts to which defendant testified in open court constitute judicial admissions which were binding upon him and which amounted to a waiver of all controversy as to those facts. Based on this contention plaintiff claims these admissions by defendant establish that he failed to maintain a proper lookout and that he did not have his vehicle under reasonable control.

"A person traveling a favored street protected by a stop sign, of which he has knowledge, may properly assume that oncoming traffic will obey it." Riekes v. Schantz, 144 Neb. 150, 12 N. W. 2d 766. See, also, Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Angstadt v. Coleman, 156 Neb. 850, 58 N. W. 2d 507.

However, we have said: "Even though the driver of a car has the right-of-way at an intersection he still has duties in regard to other cars which are approaching and entering it at about the same time." Burhoop v. Brackhan, *supra*. See, also, Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482; Barajas v. Parker, 165 Neb. 444, 85 N. W. 2d 894; Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571; Styskal v. Brickey, 158 Neb. 208, 62 N. W. 2d 854.

And, in that respect, we have held: "The failure of

the driver of an automobile, upon approaching an intersection, to look in the direction from which another automobile is approaching, where, by looking, he could see and avoid the collision that resulted, is more than slight negligence, as a matter of law, and defeats a recovery." Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235. See, also, Bezdek v. Patrick, *supra;* Barajas v. Parker, *supra.*

It is these latter decisions which plaintiff contends are here controlling. In order to determine that question it is necessary to discuss what are judicial admissions for defendant gave contradictory versions in regard to the facts which plaintiff contends are here controlling and there is other evidence in the record relating thereto.

We said in Kipf v. Bitner, *supra,* that: " 'Admissions' in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts, and they are ordinarily classified as judicial and extrajudicial."

Therein we went on to say that: "A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true." Kipf v. Bitner, *supra.*

"A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence." Kipf v. Bitner, *supra.* See, also, Johns v. Carr, 167 Neb. 545, 93 N. W. 2d 831; Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N. W. 2d 768. We have applied this principle to admissions contained in the pleadings of the parties upon which the case was actually tried. See, Johns v. Carr, *supra;* Wright v. Lincoln City Lines, Inc., 160 Neb. 714, 71 N. W. 2d 182; Barkalow Bros. Co.

v. English, 159 Neb. 407, 67 N. W. 2d 336. Also we have applied this principle where a party or his counsel has, either in the opening statement or during the course of trial, conceded or stipulated to a fact or facts. See, Kuhlmann v. Platte Valley Irr. Dist., *supra;* LeBarron v. City of Harvard, 129 Neb. 460, 262 N. W. 26, 100 A. L. R. 767. And, under certain conditions, we have applied it to the evidence of a party to the action. See Southwestern Truck Sales & Rental Co. v. Johnson, 165 Neb. 407, 85 N. W. 2d 705.

However, in Burhoop v. Brackhan, *supra,* we said: "We think the correct rule is stated in 169 A. L. R. under the annotation of 'Binding effect of party's own unfavorable testimony' under IV b, at page 805, as follows: '* * * where the more favorable evidence relied on by a party to overcome the effect of his own self-injurious statement is in his own testimony, no distinction is drawn as compared with the situation where the curative evidence is from other witnesses. It is still for the trier of fact to decide the issue upon all the evidence.'" And, in Rueger v. Hawks, 150 Neb. 834, 36 N. W. 2d 236, we said: "Under the older practice and prevailing rule, a party is entitled to the benefit of the testimony of other witnesses in contradiction of his own, wherever his own is not of the character of a judicial admission, and concerns only some evidential or constituent circumstance of his case. This is especially so as to the circumstances of an accident or similar event, because in such a case the party's testimony is especially subject to inexactness of observation and memory." In view of the entire record we think these two statements here controlling on this issue.

As we said in Kipf v. Bitner, *supra:* "An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission. * * * An extrajudicial admission is not ordinarily final and

conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel." See, also, Angstadt v. Coleman, *supra.*

Before discussing the facts in more detail we set forth the following principles here applicable to the driver of the car in which plaintiff was riding.

"A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be imprudent to proceed into the intersection. * * * Where a motorist on a nonfavored street stops at an intersecting arterial highway when the intersection is clear of traffic, looks to the right and left for approaching vehicles, acting as a reasonably prudent person in the exercise of due care would act in the belief that he has time and opportunity to safely cross, he is not liable for negligence merely because he attempts to do so. * * * Upon properly complying with the foregoing duties the driver, upon entering the intersection, does not have an absolute right-of-way which permits him to proceed without looking but must continue to maintain a proper lookout for the safety of himself and others traveling upon the streets." Paddack v. Patrick, *supra.*

Under the principles announced by this court in Burhoop v. Brackhan, *supra,* and Styskal v. Brickey, *supra,* and the facts disclosed by the record, plaintiff could not be guilty of contributory negligence, and that issue was properly not submitted to the jury. However, as we said in Bergendahl v. Rabeler, 133 Neb. 699, 276 N. W. 673: "Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the car or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident." See, also, Burhoop v. Brackhan, *supra.*

This latter issue was raised by defendant's answer and properly submitted by the court's instruction No. 11.

We shall consider the record on the basis of the principle applicable when a motion is made for a directed verdict or when a verdict has been rendered for the party against whom the motion for judgment notwithstanding the verdict is made.

From the evidence adduced a jury could find that Keefover, with his wife and plaintiff in the front seat, was driving his Plymouth automobile north on Twenty-sixth Street; that when he came to where it intersects with R Street he stopped his car at the stop sign located on Twenty-sixth Street at the southeast corner of that intersection; that he then looked both west and east down R Street, his view being unobstructed, and saw no vehicles approaching from either direction; that he then started his automobile and proceeded to drive into the intersection; that after starting up his automobile Keefover did not again look to the east until after both plaintiff and his wife made an outcry, which happened after the Plymouth had fully entered the intersection, being north of the south curb line of R Street; that when this outcry was made Keefover immediately applied his brakes and almost came to a stop, skidding his tires a distance of approximately 13 feet 8 inches in doing so; that upon applying his brakes Keefover looked to the east and saw a Hudson automobile approaching the intersection from that direction, it then being some three-car lengths east thereof; that the front of Keefover's car was then just across the center of R Street; that Keefover thereupon released his brakes, let out his clutch, and stepped on the gas; and that he traveled about one-car length thereafter, his car being hit when its rear end was about 3 feet north of the center line of R Street.

The jury could also have found that as defendant turned west onto R Street from Twenty-seventh Street, where he had been stopped by a traffic signal, he picked

up speed; that his speed picked up to where he was going 25 to 30 miles an hour; that his view to the west was unobstructed, there being no other traffic on R Street at that time between Twenty-fifth and Twenty-seventh Streets; that he was between 50 and 100 feet from the Plymouth when he saw it out in the intersection; that the Plymouth seemed to stop and then start up again; that he immediately applied his brakes, leaving skid marks for a maximum distance of 24 feet, 6 inches; that he held to his side of the center of R Street, striking the Plymouth at a point about 6 feet north of the center thereof; and that after the impact his car came to almost an immediate stop.

It is true that defendant testified he first saw the Plymouth when its rear end was only about 3 feet south of the center of R Street; that he told the police officer investigating the accident that he was only 10 feet from the Plymouth when he first saw it; that he immediately applied his brakes; and that he was going 24 to 25 miles an hour at the time of the impact. The jury was not obligated to believe this testimony and could very well have come to the conclusion that defendant was mistaken when he made such admissions and so testified. That is particularly true when the following physical facts are considered: First, the reaction time it takes a driver to apply his brakes after seeing an object in his path; second, the length of the skid marks left by the tires up to the point of impact; and third, the fact that the Hudson came to almost an immediate stop after the impact.

"Negligence is the doing of something which an ordinarily prudent person would not have done under the same or similar circumstances, or the failure to do something which an ordinarily prudent person would have done under the same or similar circumstances. * * * Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces

the injury, and without which the injury would not have occurred." Shupe v. County of Antelope, 157 Neb. 374, 59 N. W. 2d 710.

Under the factual situation here disclosed a jury could properly find that Keefover was negligent in the manner in which he operated his automobile when he drove it into the intersection and that such negligence was the proximate cause of the accident and, in view of its verdict, apparently did so. In this respect we have not overlooked the fact that defendant testified that when he first saw the Plymouth automobile he probably could have turned to the left and have avoided hitting it but did not do so because of the danger involved to any oncoming traffic from the west. Plaintiff contends the record shows there was no traffic on R Street between Twenty-fifth and Twenty-seventh Streets at the time. It is true that defendant testified he observed no traffic ahead of him going west on R Street as far as Twenty-fifth Street and he didn't notice any coming east. However, whether or not any traffic had come from the west on R Street from beyond Twenty-fifth Street while defendant was driving west thereon between Twenty-seventh Street and the point of the accident is not established. Whether or not, under these circumstances, defendant was negligent in this regard we think was properly a jury question.

In view of what we have said we think the issue of negligence and proximate cause, insofar as the defendant was concerned, was a question for the jury. Since no question is raised as to the manner of its submission, we affirm the judgment of the trial court overruling plaintiff's motion.

AFFIRMED.

IN RE APPLICATION OF BURLINGTON TRUCK LINES, INC.
BURLINGTON TRUCK LINES, INC., APPELLEE, V. BROWN TRANSFER ET AL., APPELLANTS.
102 N. W. 2d 450

Filed April 22, 1960. No. 34724.

1. **Public Service Commissions: Motor Carriers.** An application to the Nebraska State Railway Commission for the transfer of valid intrastate operating rights from one common carrier to another is properly instituted under section 75-240, R. R. S. 1943.
2. ———: ———. An order of the Nebraska State Railway Commission granting an application to a trucking company to operate over alternate routes for convenience only does not authorize the carriage of freight other than that which can be transported on the regular route authority.
3. **Public Service Commissions: Appeal and Error.** This court will not disturb an order of the Nebraska State Railway Commission based on evidence unless the evidence shows that such order is unreasonable or arbitrary.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

Viren, Emmert, Hilmes & Gunderson, C. J. Burrill, and *Eleanor Knoll Swanson,* for appellants.

J. W. Weingarten and *James M. Adams,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from two orders of the Nebraska State Railway Commission approving the transfer of intrastate motor vehicle operating rights as a common carrier from Carl E. Speck to Burlington Truck Lines, Inc., and authorizing the Burlington Truck Lines, Inc., to operate over alternate routes for operating convenience only. The appellants, Brown Transfer, Peterson & Peterson, Inc., Red Ball Transfer Co., Inc., and Watson Bros. Transportation Co., Inc., protestants and interveners below, have appealed.

On February 26, 1959, the Burlington Truck Lines,

Inc., filed its application with the commission seeking a transfer to it of the intrastate operating rights held by Speck, whose certificate authorized the transportation of commodities generally, and specially, mainly small class freight and perishables requiring refrigeration, over regular routes from Kearney to and from Hastings via U. S. Highway No. 30 to Wood River, thence on a county highway to Hastings, serving the intermediate points of Gibbon, Shelton, and Wood River, and the off-route point of Kenesaw. On the same day Burlington Truck Lines, Inc., filed a second application requesting commission approval to operate over two alternate routes for operating convenience only: (1) To and from Kearney via Nebraska Highway No. 44 to its junction with U. S. Highways Nos. 6 and 34; (2) to and from Grand Island via U. S. Highway No. 30 to its junction with an unnumbered county road at Wood River. The two applications were set for hearing and notice was given thereof, such applications being consolidated for the purpose of hearing only. The hearing on the applications was held at Kearney on March 17, 1959, before an examiner for the commission. On April 28, 1959, the examiner filed his report recommending approval of the transfer application and a denial of the extension application. Exceptions were filed to the examiner's report. After hearing the commission entered an order on July 7, 1959, overruling the exceptions and granting both applications. Motion for a rehearing was filed by the appellants and after oral argument it was overruled on August 11, 1959. The appeal was taken from this order.

The record shows that on May 12, 1947, Speck filed an application with the commission for the transfer to him of the certificate held by George W. Mastalka. On May 14, 1947, the commission granted the application and issued a certificate of public convenience and necessity to Speck. Notice was not given nor a hearing held on this application. Under the holding of this court in

In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552, the certificate granted to Speck was void. However, under the rule announced in Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865, and the evidence adduced, the commission was authorized to validate Speck's operating rights by the issuance of a new certificate. The evidence clearly shows that Speck had operated under color of right since 1947 and had in all respects complied with the law and regulations of the commission during the period of his operations.

It is the contention of the appellants that since the certificate issued to Speck in 1947 was void, the procedure for transferring Speck's rights to the Burlington Truck Lines, Inc., should have been brought under section 75-230, R. R. S. 1943, and not under section 75-240, R. R. S. 1943. In other words, the contention is that the application should have been for the issuance of a new certificate rather than for the transfer of his operating rights which he held under color of right under a void certificate.

The primary purpose of the proceeding was to transfer the operating rights of Speck to the Burlington Truck Lines, Inc., as evidenced by the certificate granted him on May 14, 1947. We have repeatedly held that the holder of a certificate has no vested property right therein. It grants him a privilege only which he cannot transfer without commission approval. A transfer must be approved by the commission, after which a new certificate is issued to the transferee. Even where the transfer of a valid certificate is involved the commission is required to find that the operating rights evidenced by the certificate have not been lost through dormancy or any other reason. Such lost rights can be granted to a transferee under section 75-240, R. R. S. 1943, only on satisfactory proof as required in the grant of a new certificate under section 75-230, R. R. S. 1943. It seems to us that an application for the transfer of operating

rights may in like manner involve a showing that the transferor is entitled to a certificate even though the one he holds is void in that it was not issued as required by statute. It is only the operating rights which the transferor actually has that may be transferred, irrespective of the validity or invalidity of the certificate, in whole or in part. Such being the case, an application for the transfer of operating rights obtained under color of right is properly brought under the transfer statute, section 75-240, R. R. S. 1943, irrespective of the validity or form of the certificate evidencing the existence of such rights. It would be a vain procedure to require the issuance of a valid certificate to Speck only to revoke it in order to issue a new certificate to the transferee in the transfer proceeding. We necessarily conclude that the operating rights of Speck, valid under our holding in the Preisendorf case, which were found to be in accordance with those stated in the void certificate, except for the off-route point of Kenesaw which the parties agree had become dormant, was properly transferable to the Burlington Truck Lines, Inc., under the proceedings provided by the transfer statute, section 75-240, R. R. S. 1943.

This conclusion is clearly in accord with our holding in Abler v. Wheeler Transp. Service, Inc., 169 Neb. 728, 101 N. W. 2d 476, wherein we upheld a transfer of operating rights under section 75-240, R. R. S. 1943, on an identical state of facts. The correctness of the holding in that case is supported by the language of section 75-240, R. R. S. 1943, wherein it says in part: "Whenever a consolidation, merger, purchase, lease, operating contract or acquisition of control of the properties, certificates or permits is proposed, the carrier or carriers or person seeking authority therefor shall present an application to the State Railway Commission, and thereupon the commission shall notify such carriers and other parties known to have an interest, of the time and place for a public hearing in accord-

ance with such rules and regulations as the commission may prescribe." The foregoing indicates that it is the transfer of property and operating rights that this section of the statute is designed to cover, not merely the transfer of the transferor's certificate of public convenience and necessity which is only prima facie evidence of the operating rights he actually has. We conclude that an application for the transfer of property, operating rights, certificates, or permits from one motor carrier to another is properly instituted under the provisions of section 75-240, R. R. S. 1943.

The second application was filed under the provisions of sections 75-228 to 75-232, R. R. S. 1943. The application states that applicant, in conjunction with its transfer proceeding, desires authority to operate over two routes for operating convenience only, serving no intermediate points. The evidence is that the regular route highway from Wood River to Hastings is a county road and not an all-weather highway. The applicant sought the alternate route from Wood River to Grand Island to Hastings, a paved route, solely as a matter of convenience for operating use in bad weather. The second alternative route was sought for a similar purpose. The protestants assert that the granting of the application would, in effect, provide a new service which would be competitive with the authority possessed by them. The applicant recognized that the grant of the alternative route was not a grant of additional service and offered at the trial to stipulate that a specific restriction to that effect be added to its certificate. The commission did not restrict the applicant's certificate in that manner. The grant of applicant's application was for the purpose of convenience only. This, we think, was a limitation upon the use to be made of the alternate routes and was not a grant of additional authority to handle any freight over the alternate route that could not be handled over the regular route authority transferred by Speck to the Burling-

ton Truck Lines, Inc. The grant of the alternate routes, therefore, does not authorize any freight service outside the scope of the authority granted over the regular routes. So construed, the objections of the protestants are without merit. The evidence of the applicant is sufficient to sustain the commission's order; that is, the order is sustained by evidence and is not unreasonable nor arbitrary.

We conclude therefore that both applications were properly granted under the evidence adduced, and consequently such orders were not arbitrary nor unreasonable, a finding necessary to obtain relief in this court on appeal.

AFFIRMED.

AMOS CLOWN HORSE, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 625

Filed April 22, 1960. No. 34757.

1. **Homicide.** A purpose to kill and malice are essential elements of murder in the second degree and in a prosecution therefor each must be established beyond a reasonable doubt.
2. **Criminal Law.** This court may not in a case of the character of the present one resolve conflicts in or weigh the evidence or pass upon the credibility of the witnesses.
3. ———. It is implicit in a verdict of guilty in such a case that the jury decided all controverted questions of fact unfavorably to the accused and this court will not disturb the verdict if based on evidence unless, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.
4. **Homicide.** In a case of the character of the present one the unlawful killing is the principal fact but the condition of the mind of the accused or the attendant circumstances determine the class of the crime as second-degree murder or as manslaughter.
5. **Homicide: Trial.** If the evidence in reference thereto is such that various inferences may properly be deduced therefrom as to the degree of the crime, the trial court must submit the

different degrees to the jury to determine which inference shall prevail.

6. ———: ———. It is the duty of the district court to instruct the jury on such degree or degrees of homicide as are supported by evidence sufficient to sustain a verdict of guilty.

7. **Homicide.** If the fact of the homicide is established but the circumstances of it are not fully shown on the trial so that the jury can judge from the circumstances whether it was intentional, the law presumes legal malice; but if the circumstances of the homicide are all established by the evidence at the trial, then the law creates no presumption of malice but the issue as to it is one of fact to be determined by the jury from all of the circumstances surrounding the homicide.

ERROR to the district court for Scotts Bluff County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Willis A. Herman and *Donald L. Wood,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

The plaintiff in error, herein designated accused, was charged with the crime of murder in the second degree, was convicted of the crime of manslaughter, and was adjudged to be confined in the Nebraska State Penitentiary for a definite term. He prosecutes this error proceeding to review the record of his conviction.

The accused and Sarah Bad Heart, also named Sarah Bad Heart Bull and referred to herein as Sarah, were employed by and worked for a farmer northeast of Minatare and they with the five children of Sarah, the oldest of whom was 10 years and the youngest 6 months, lived in a labor house which was secured by the accused. He was not related to Sarah or any of her children. She and her husband were estranged and at the times important to this case he was confined in jail at Scottsbluff.

The accused and Sarah went to Scottsbluff on July 29, 1959. Accused stopped at a pool hall and Sarah did some shopping after which she went to Earl's Pool Hall, met the accused, and they drank beer. They then repaired to the Daily Double Bar and drank more beer. From there they traveled to Gering, arriving there about noon of that day. They visited the Union Bar in Gering and drank beer. They were joined there by Lila Orr Hamburger, hereafter spoken of as Mrs. Hamburger or the deceased, who brought the beer she was drinking with her and sat down and visited with the accused and Sarah. Mrs. Hamburger consented to take Sarah and the accused in her automobile to the home of the parents of accused on a farm west of Gering but before they started on that trip they secured two six-packs of beer and the three of them drank it while on that trip. They stayed at the farm where the parents of accused lived for quite a while and then returned to Gering and stopped at the Safeway Store where Sarah did some more shopping. Mrs. Hamburger wanted more beer and they went to Terry's in Terrytown between Gering and Scottsbluff and bought two six-packs of beer. It was then probably 3 or 4 o'clock in the afternoon. They then proceeded to the home of Mrs. Hamburger on the southeast corner of L and Twelfth Streets, known as 1115 L Street, in Gering to drink the beer they had recently purchased after which Mrs. Hamburger was going to take accused and Sarah to their home near Minatare. They sat in the home, conversed, and drank beer. Mrs. Hamburger produced a bottle of wine and she and accused drank it. They ate sandwiches prepared by her and thereafter accused wanted Sarah to go home with him because her five children had been left at home alone. She wanted to stay with Mrs. Hamburger who said she would bring Sarah home later in the evening. Accused insisted that Sarah go home with him and she refused. Accused became angry and he slapped Sarah. Mrs. Hamburger swore at

accused and told him not to slap Sarah again. Accused took Sarah by both arms in an attempt to have her go home with him to the children who had been alone in the home since before noon. Accused and Sarah were fighting and scuffling in the living room of the Hamburger home. Accused slapped Sarah a second time and thereupon Mrs. Hamburger stabbed accused in the back with a butcher knife. It was then about 8 o'clock in the evening.

The wound inflicted on accused by the stabbing was on the right upper posterior chest, that is, the back of the chest. It was deep enough that it communicated with the chest cavity. The knife struck a rib, traveled obliquely downward between two ribs, entered the chest cavity, and caused lung damage. The wound was probed with a rubber catheter and about 8 inches of it extended into the chest cavity. When a doctor saw accused a brief time later he was suffering severe pain, difficulty in breathing, and shock.

A specimen of blood was secured later that evening from accused and from the body of Mrs. Hamburger. The blood alcohol content from accused was determined to be 0.31 or 310 milligrams percent, and the blood alcohol content of the specimen from the body of Mrs. Hamburger was determined to be 0.15 or 150 milligrams percent. The result of each of these determinations was indicative of alcoholic intoxication. The record is convincing that accused, Mrs. Hamburger, and Sarah were each intoxicated when they went to the Hamburger home and thereafter until the two first named were placed in the hospital and Sarah was confined in jail.

Sarah did not see the knife with which accused was stabbed and she did not know that Mrs. Hamburger had it until after the accused was stabbed in the back by Mrs. Hamburger. She did not know who took the knife out of the body of accused. There is undisputed evidence of two doctors that accused could not have taken it from his body. Soon thereafter accused had

the knife in his hand and that is when Sarah first saw it. She grabbed for it, the knife was jerked away, and that is how her left hand was cut. Accused turned his body and she saw blood on his back from the wound caused by the stabbing of him. When accused turned around he slapped or hit Mrs. Hamburger and she fell or sat down in a big chair or on a couch. Sarah heard the accused say he was stabbed or something like that and to call the cops. She ran from the house and down the road until she met an automobile which stopped. The record is not clear what she told the operator of the automobile but it indicates she made it known to him that something serious had happened at the Hamburger home. Sarah came to the automobile of Mrs. Hamburger which was parked in the street in front of the Hamburger house and accused was then standing by it. He was all bloody. She attempted to take hold of him but he did not want to be touched. He told her to get away. He got into the front seat of the automobile and lay on his back. She got in the back seat and tried to talk to him but she could get no response. He gave evidence of suffering pain and appeared to be quite unconscious. She did not go back into the Hamburger house. The sheriff came to the automobile soon afterwards and put a bandage on her bleeding hand. He asked her what had happened and she told him that Mrs. Hamburger stabbed accused and then he stabbed Mrs. Hamburger. When accused was on the sidewalk near the automobile he told Sarah that he stabbed Mrs. Hamburger. There had been no ill feeling, disagreement, or difficulty between either the accused or Sarah and Mrs. Hamburger before the occurrences of the evening of that day which are involved in this case. All of their relations had been cordial and pleasant.

Two police officers came to the Hamburger home soon after Sarah got into the automobile parked in the street. She told the officers that a woman in the house had been stabbed. The officers entered the house and found

Mrs. Hamburger on the floor with a butcher knife inserted in her abdomen. The entire blade of the knife except about the last inch thereof next to the handle was buried in her body. The police officers called the sheriff and then they went for a doctor. The doctor was brought to the scene of the tragedy and he with the sheriff entered the house. They found Mrs. Hamburger on the floor with her left arm lying back of her and her legs drawn up. The doctor examined her. She was living but her respirations were very stertorous and she had no pulse or blood pressure. There was a knife in her left upper abdomen and she was covered with blood. The doctor administered an injection of adrenalin, removed the knife from her body, and told the sheriff and police officers to get her to the hospital at once. She was placed in an ambulance and taken to the hospital. She was dead when the ambulance arrived there. There were multiple bruises and minor lacerations about her head and face. They were especially on the right side of her face and involved the nose, the tissue about the right eye, right cheek bone, the right ear, and the area immediately behind the ear involving the bony prominence that is referred to as the mastoid area, and a stab wound in the body. The right side of her upper lip was bruised and had a laceration. Her mouth contained a broken dental plate and was partly filled with blood. Her left arm was broken at the junction of the upper third and the middle third of the humerus. The stab in her body was in the right hypochondrian, that is, it was just to the left of the midline and at the level of the sixth costal cartilage that joins the rib to the breastbone. The wound was straight into the body and extended into the attachment of the diaphragm to the rib cage, the left lobe of the liver, the ligament that suspends the stomach, into the peritoneal area, the tissues in the back part of the abdominal cavity, and through the aorta, both the front and back walls of it. The aorta

is that main branch from the heart which conducts blood to all parts of the body except the lungs.

The cause of the death of Mrs. Hamburger was hemorrhage of the stab wound of the aorta, most of which occurred into the abdominal cavity but there was a considerable amount of blood that leaked through the abdominal skin wall. The immediate cause of her death was a direct result of the stab wound made in her body.

The accused, Sarah, and deceased went to and entered the home of the latter on the afternoon of July 29, 1959, and they were the only persons there until Sarah left after the accused was stabbed by deceased. Thereafter she and accused were the only persons in the house until the police officers entered and found deceased with the knife thrust into her abdomen which caused the wound resulting in her death. Those three persons were the only ones at or near the house when the officers arrived there that evening. There was no mention in the record of any other person being at or near the house during that time or that anyone except these three persons had any part in the tragic events of that afternoon and evening. The deceased was a small person. Her height was 5½ feet and her weight was about 105 pounds. The accused was at least 6 feet tall, weighed about 205 pounds, was 27 years of age, able-bodied, athletic, and a trained fighter in the heavyweight class who had experienced fighting in the ring.

The accused in his version of the affray admitted that he was attempting to get Sarah to go with him from the Hamburger home because it was approaching night and the children of Sarah had been told that their mother and the accused would be home before dark that evening; that he slapped Sarah, how many times he did not remember; that he had her by one arm; and that they were resisting each other. It was at that time that accused was hit from behind with the knife and was stabbed by deceased. He quickly turned around. He struck deceased and he then saw for the first time

that she had a knife in her right hand. He grabbed her arm and they wrestled. He was attempting to take the knife from her. He said he thought she was going to use it again. He did not get the knife away from her and asserts he never did have it in his hand. He said at no time did he have the knife in either of his hands. He was experiencing trouble in breathing and was trying to get some air. He moved toward the door, opened it, fell down once or twice but finally got to the automobile parked in front of the house, and that was the last he remembered until the next morning in the hospital. He said when he saw the knife in the hand of deceased he for the first time realized that he had been stabbed. He said he had no reason, intention, or desire to do the deceased any injury and had no knowledge that he did so. He did remember that as he was struggling for breath and trying to get out of the house he saw her lying there in the room.

Sarah testified at the trial she did not remember that accused told her he stabbed deceased, and Sarah said she did not remember she told the sheriff accused had told her that he stabbed deceased. This record is adorned with inconsistent and contradictory statements but it was for the jury to say which were true and from the circumstances presented to it at the trial to determine the facts.

This court may not in a case of this kind decide conflicts in or weigh the evidence or pass on the credibility of witnesses. It is implicit in a verdict of guilty that the jury resolved all controverted questions of fact in favor of the State and this court will not disturb such a verdict based on evidence unless, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. Hertz v. State, 160 Neb. 640, 71 N. W. 2d 113; Wright v. State, 169 Neb. 497, 100 N. W. 2d 51.

This prosecution was based on section 28-402, R. R. S. 1943, which in part declares: "Whoever shall pur-

posely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree * * *." Malice and a purpose to kill are thereby made essential elements of the crime charged. Vanderheiden v. State, 156 Neb. 735, 57 N. W. 2d 761; Wright v. State, *supra.*

The relevant language of section 28-403, R. R. S. 1943, is: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter * * *."

If an information charges the crime of murder in the second degree, the crime of manslaughter is included in the charge. In a case of the character of the present one the unlawful killing is the principal fact but the condition of the mind or the attendant circumstances determine the class or grade of the crime as second-degree murder or manslaughter. If the evidence in reference thereto is such that various inferences may properly be deduced therefrom as to the degree of the crime, the trial court must submit the different degrees to the jury to determine which inference shall prevail. Vanderheiden v. State, *supra;* Wright v. State, *supra;* Woodard v. State, 159 Neb. 603, 68 N. W. 2d 166. It is, of course, the duty of the district court to instruct the jury only on such degree or degrees of homicide as are supported by evidence sufficient to sustain a verdict of guilty. Woodard v. State, *supra.*

The accused complains that it was prejudicial error for the district court to instruct the jury as a part of its charge on the subject or element of intent, as follows: "Every sane person is presumed to intend the natural and probable consequences of his voluntary acts." It is said by the accused that this relieved the State of its burden of proving the element of malice beyond a rea-

sonable doubt and this is correct. It is also said by accused that the part of the instruction quoted above operated to prejudice defendant in his right to a fair and impartial trial. It cannot be conceded that this is a correct conclusion. It assumes, as the brief of accused asserts, that when the homicide is fully testified to by witnesses in a case in which second-degree murder is charged, the State to make a case must prove beyond a reasonable doubt that the homicidal act was done feloniously with the intent and purpose to kill.

In the present case the circumstances attending the homicide were not fully testified to by an eyewitness. The accused did not attempt to testify fully as to what took place in the Hamburger house after Sarah left upon his instructions to get the police shortly after he had been stabbed by deceased and before she was beaten, bruised, lacerated, her left arm bone fractured, and a fatal wound inflicted upon her by being stabbed with a sizable knife near enough to her heart to make an opening in a principal artery of her body. Sarah was not in the Hamburger house when any of the things referred to immediately above happened to deceased. Sarah was out of the house looking for the police when the wound was inflicted upon the body of deceased which was the cause of her death. There was no eyewitness to the killing of deceased who could or did testify to the circumstances thereof upon the trial of this case. The contention in this regard made by the accused is not new. It was announced in the decision of a similar contention in Vollmer v. State, 24 Neb. 838, 40 N. W. 420, that on a trial for murder in the second degree malice can be implied if the killing alone is shown; but if all the circumstances connected with the killing were shown by an eyewitness, then malice in such a case was a question of fact for the consideration and determination of the jury. This doctrine has since

been consistently adhered to in many subsequent decisions of this court.

Lucas v. State, 78 Neb. 454, 111 N. W. 145, states: "The law implies malice in cases of homicide if the killing alone is shown, but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing."

This court said in Flege v. State, 90 Neb. 390, 133 N. W. 431: "If the fact of the killing is established and the circumstances surrounding the killing are not fully shown, so that the jury can judge from the circumstances whether it was intentional, the law will imply legal malice; but, where the circumstances of the killing are all established by evidence or are manifest and not controverted, the law raises no implication as to malice, but leaves that as a fact to be determined by the jury from all of the circumstances surrounding the killing."

Chadek v. State, 138 Neb. 626, 294 N. W. 384, declares: "In a prosecution for murder in the second degree, when the fact of unlawful killing is proved and no evidence tends to show express malice on the one hand or any justification on the other, the law presumes malice. There is an inference that the killing was intentionally done. The crime of murder in the second degree is established, and the evidence requires the submission of the case to the jury." See, also, Kennison v. State, 80 Neb. 688, 115 N. W. 289; Whitehead v. State, 115 Neb. 143, 212 N. W. 35; Tvrz v. State, 154 Neb. 641, 48 N. W. 2d 761; Woodard v. State, *supra;* Wright v. State, *supra.* The instruction challenged by accused was, under the circumstances of this case, properly given to the jury.

It is argued by accused that his conviction is not sustained by the evidence and is contrary to law. It is not claimed that deceased was responsible for the injuries to her body which she suffered while only she

and the accused were in her home and Sarah was out on the street attempting to secure the presence of the police. The facts and circumstances permitted the jury to find that the accused was the only person who could have fatally injured deceased. The accused had quarreled and fought with and abused Sarah. He was intoxicated and when he was stabbed he released Sarah, suddenly turned around, and hit deceased. It was then that Sarah left the house. Shortly thereafter when accused came from the house to the automobile parked in front of it in the street and met Sarah she was told by the accused that: "I fixed her. I stabbed her back * * *," or words having that meaning. Sarah said that accused was then all covered with blood. Deceased in a matter of minutes thereafter was found in the house cut, bruised, the dentures in her mouth broken, one arm fractured, and a knife thrust into her body causing a wound which meant and resulted in certain death. The force to which she was subjected and the severity of the injuries inflicted upon her were indicative of a desire and purpose to destroy the victim and they were far beyond any protection required by accused from any hazard the victim could have been to him. She was a small person of scarcely 100 pounds. Accused was a tall, large, heavy, able-bodied young man trained in the art of boxing and experienced as a fighter of the slugger class. He had fought in and out of the ring. Any contest between them was heavily weighted in favor of the accused. He had no requirement for a butcher knife or the use of it to protect him from any threat to his safety of which she was capable. The choice of the location of the place of the insertion of the knife in the body and the accuracy of the direction of it to a distance that meant inevitable death of the victim were entitled to great consideration by the jury in deciding the purpose and intention of the accused. The jury could have found from the record in this case that the accused maliciously and

purposely killed deceased. In Woodard v. State, *supra,* it is said: "Where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees to the jury for its determination. See Jackson v. State, 133 Neb. 786, 277 N. W. 92. * * * We said in Fields v. State, 125 Neb. 290, 250 N. W. 63: 'If either Brown or the accused pointed the gun at the deceased, or some other person, and purposely fired the gun, then the intent to kill became specific * * *.' * * * While it is true that the jury did not find such purpose and intent existed, nevertheless, we think the evidence adduced was sufficient to support such a finding if it had been made. It was therefore not only proper but the duty of the trial court to submit the issue of second degree murder." A legal reason for interfering with the verdict of the jury has not been presented herein. Vanderheiden v. State, *supra,* states: "In a criminal case, this court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt."

The judgment and sentence should be and they are affirmed.

AFFIRMED.

EDWARD D. KENNEDY, ALSO KNOWN AS EDWARD KENNEDY, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 620

Filed April 22, 1960. No. 34806.

SUPPLEMENTAL OPINION

Criminal Law: Appeal and Error. The poverty affidavit of a defendant in a criminal case, filed under the provisions of section

24-342, R. S. Supp., 1959, in order to obtain a bill of exceptions at the cost of the county, must be filed within the same period of time as is provided by our rules for the ordering of the bill of exceptions, that is, within 1 calendar month after the rendition of the judgment or making of the final order complained of.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. On motion of plaintiff in error for preparation of bill of exceptions. *Motion of plaintiff in error for bill of exceptions overruled.*

Jack L. Spence, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Bernard L. Packett*, for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This cause was submitted on two motions. On March 25, 1960, our opinion was released disposing thereof. See Kennedy v. State, *ante* p. 193, 101 N. W. 2d 853. On the same day Edward D. Kennedy, plaintiff in error and defendant below, filed a supplemental transcript in this court. It discloses that on March 18, 1960, he filed a poverty affidavit in the district court for Douglas County wherein he asked that court "for an order directing the Clerk of the District Court of Douglas County to order a Bill of Exceptions and tax the costs of the preparation thereof to Douglas County * * *." This request the district court denied on March 21, 1960.

It appears from the supplemental transcript that no objections were made to plaintiff in error's affidavit, which was in the form of an application. It stands uncontradicted. Plaintiff in error contends, in view of our holding in Fisher v. State, 153 Neb. 226, 43 N. W. 2d 600, that the trial court therefore erred in denying his application for the order requested. He requests we overrule the trial court's order doing so and direct the clerk to have the official court reporter prepare a bill

of exceptions for him at the expense of Douglas County.

Section 24-342, R. S. Supp., 1959, under and pursuant to which plaintiff in error filed his poverty affidavit in the form of an application, does not provide when it shall be filed. However our rules, which have been in effect since September 28, 1959, provide, in criminal cases, "that it (bill of exceptions) shall be ordered within the period of time allowed for the filing of the petition in error in the Supreme Court." Rules of the Supreme Court, 1960, Rule 7h, p. 9. Section 25-1931, R. R. S. 1943, provides "one calendar month" for this purpose.

Here plaintiff in error's request for a bill of exceptions was filed with the clerk of the district court for Douglas County on February 3, 1960. This was within 1 calendar month of the final order complained of in this error proceeding, which was rendered on January 11, 1960. As already stated, the poverty affidavit of plaintiff in error was not filed in the district court until March 18, 1960. In order to expedite appellate procedure in criminal cases and to make such procedure certain and uniform as to when each step must be taken, we hold the poverty affidavit of a defendant in a criminal case, filed under the provisions of section 24-342, R. S. Supp., 1959, in order to obtain a bill of exceptions at the cost of the county must be filed within the same period of time as is provided by our rules for the ordering of the bill of exceptions. That is, within 1 calendar month "after the rendition of the judgment or making of the final order complained of." See § 25-1931, R. R. S. 1943.

In view of the foregoing we overrule the motion of plaintiff in error requesting us to "issue an order directing said trial court to order the costs of the preparation of a bill of exceptions to be taxed to Douglas County, Nebraska."

MOTION OF PLAINTIFF IN ERROR FOR BILL OF EXCEPTIONS OVERRULED.

JOHN JONES ET AL., APPELLANTS, V. HENRY SCHMIDT ET AL., APPELLEES.
102 N. W. 2d 640

Filed April 29, 1960. No. 34727.

1. **Quieting Title.** The plaintiff in an action to quiet title to real estate has the burden of proof and he must recover upon the strength of his own title and not because of weakness in the title of his adversary.
2. **Quieting Title: Waters.** A plaintiff who seeks to have title to real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence.
3. **Waters.** Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.
4. **Adverse Possession.** A party, in order to establish title to real property by the operation of the statute of limitations, or in other words by adverse possession, must prove by a preponderance of the evidence that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute.
5. ———. In order to establish title by adverse possession it is not necessary that a party shall prove complete enclosure nor that he remained continuously on the land for the statutory period, but only that the land was used continuously for the purposes to which it was by its nature adapted.
6. ———. The statutory period for the establishment of title to real estate by adverse possession is 10 years.

APPEAL from the district court for Cedar County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Mark J. Ryan, Philip H. Robinson, and *Clarence E. Haley,* for appellants.

Max W. Goetz, Frederick M. Deutsch, and *William I. Hagen,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by John Jones, Lawine Casey, Leona

Adair, Lowell Jones, Margaret Day, Shirley Jones, and Ogar Jones, plaintiffs, against Henry Schmidt and Agnes Schmidt, defendants, to have quieted in them title to land in Cedar County, Nebraska, described as follows: "Commencing at the center of Section Thirteen (13) Township Thirty-three (33) Range One (1) East of the 6th P.M. in Cedar County, Nebraska, running thence East along the eastwest half section line of said Section 13-33-1E a distance of 2570 feet, thence due north a distance of 150 feet for the place of beginning. Running thence 1965 feet south 63 degrees east; thence 1375 feet south 19 degrees east, thence 1220 feet south 18 degrees east, thence 2135 feet south 38 degrees east, thence 645 feet south 18 degrees east, thence 810 feet south 4 degrees east, thence 159 feet south 54 degrees east; thence 695 feet south 67 degrees east, thence 955 feet south 61 degrees east, thence 775 feet south 59 degrees east, thence 156 feet north 26 degrees east, thence 1050 feet north 15 degrees west, thence 792 feet north 2 degrees east, thence 174 feet north 12 degrees east, thence 1420 feet north 22 degrees east, thence 920 feet north 10 degrees east, thence 955 feet north 27 degrees east, thence 996 feet north 12 degrees west, thence 1120 feet north 22 degrees west, thence 4400 feet north 25 degrees west, thence 2960 feet north 63 degrees west, thence 1570 feet north 75 degrees 30 minutes west, thence 470 feet south 18 degrees 30 minutes west, thence 4400 feet south 5 degrees west, thence 222 feet south 8 degrees west, thence 115 feet south 26 degrees west to the place of beginning, all in Cedar County, Nebraska." This description is based on a survey made in 1955. The basis of the action is claimed ownership of the land which they allege is accretion to Lot 1, Section 29, Township 33, Range 2 East in said Cedar County, Nebraska. This lot was in her lifetime the property of Margaret Jones. It descended to the heirs of Margaret Jones on her death, a part of which became the property of each of the plaintiffs by inheritance and a part

of which came to John Jones by purchase from other heirs.

After the action was filed the named defendants filed an answer and cross-petition. As to the answer nothing needs to be said except that there was a denial that the lands in question were accretion and also a denial that they belonged to the plaintiffs.

By the cross-petition the defendants made all persons having or claiming any interest in certain property parties to the action and had process duly issued and served. The description of the property in the cross-petition is as follows: "Commencing at the East Quarter Corner of Section Thirteen, Township Thirty-three North, Range One, East of the Sixth Principal Meridian in Cedar County, Nebraska, thence from the East-west center line of said Section Thirteen, an angle to the left of 86 degrees, 29 minutes, for 148.0 feet, to the point of beginning, a parcel of land bounded on the Southwest by a meander line described as follows: Commencing at the point of beginning, thence with an angle to the right, with a line between the East Quarter Corner and point of beginning, of 126 degrees, 23 minutes, for 693.6 feet, thence with an angle to the left of 34 degrees, 59 minutes, for 491.7 feet, thence with an angle to the right of 16 degrees, 35 minutes, for 473.0 feet, thence with an angle to the right of 27 degrees, 54 minutes, for 401.8 feet, thence with an angle to the right of 21 degrees, 05 minutes, for 322.4 feet, thence with an angle to the left of 4 degrees, 25 minutes, for 644.5 feet, thence with an angle to the right of 13 degrees, 59 minutes, for 1564.8 feet, thence with an angle to the left of 29 degrees 39 minutes, for 1004.3 feet, thence with an angle to the right of 5 degrees, 19 minutes, for 1241.2 feet, thence with an angle to the right of 21 degrees, 52 minutes, for 798.0 feet, thence with an angle to the right of 18 degrees, 43 minutes, for 536.7 feet, thence with an angle to the left of 63 degrees, 39 minutes, for 290.7 feet, thence with an angle to the left of 3 degrees,

41 minutes, for 691.2 feet, thence with an angle to the right of 1 degree, 25 minutes, for 959.3 feet, thence with an angle to the right of 11 degrees, 06 minutes for 806.4 feet, thence with an angle to the left of 107 degrees, 20 minutes, for 222.0 feet, to the high bank of the Missouri River, bounded on the west by a meander line described as follows: From the point of beginning, thence with an angle to the right, with a line between the point of beginning and the East Quarter Corner of Section Thirteen, of 23 degrees, 38 minutes, for 106.1 feet, thence with an angle to the left of 21 degrees, 38 minutes, for 342.9 feet, thence with an angle to the left of 1 degree, 15 minutes for 1522.0 feet, thence with an angle to the left of 0 degrees, 19 minutes, for 1182.0 feet, thence with an angle to the right of 0 degrees, 27 minutes for 1109.8 feet, thence with an angle to the left of 0 degrees, 19 minutes, for 490.15 feet, thence with an angle to the right of 13 degrees, 15 minutes, for 443.15 feet, to the high bank of the Missouri River, bounded on the north and East by the Missouri River." This description is purportedly and without dispute based on a survey made in 1958. There is a slight error. Where 401.8 feet appears should appear 410.8 feet. The error is of no real significance. The land area described in the petition is not identical with that described in the answer and cross-petition but the former is included within the latter, hence in the light of the disposition made of the issues by this opinion a description of the variance does not become important.

The purpose of the cross-action was to have title quieted in the defendant Henry Schmidt on the basis of adverse possession. The defendants Henry Schmidt and Agnes Schmidt pleaded that the defendant Henry Schmidt was the owner of the land and that he had been in open, notorious, exclusive, adverse, and continuous possession thereof under color of title and claim of ownership for more than 10 years before the commencement of the action.

The plaintiffs generally denied the allegations of the answer and cross-petition.

The action was tried to the court and a decree was rendered wherein title was quieted to the land in Henry Schmidt against Agnes Schmidt, each of the plaintiffs, and all of the parties who were made defendants pursuant to the filing of the cross-petition. From the decree the plaintiffs have appealed. None of the additional parties have appealed.

From this it becomes apparent that the questions before the court are those of whether or not the plaintiffs are entitled to prevail on the ground that they are owners of these lands as accretion to Lot 1, Section 29, Township 33, Range 2 East, Cedar County, Nebraska, or whether or not Henry Schmidt is the owner by reason of adverse possession. It is not disputed that the plaintiffs are the owners of the original Lot 1.

In Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486, it was said: "Plaintiff in an action to quiet title has the burden of proof and he must recover upon the strength of his title and not because of any weakness in the title of his adversary." This pronouncement was made with reference to the question of whether or not there was a sufficiency of proof of accretion. From this it becomes clear one claiming that land is accretion has the burden of so proving by a preponderance of the evidence in an action to quiet title to the land. See, also, Stull v. Goold, 96 Neb. 263, 147 N. W. 468; Durfee v. Keiffer, 168 Neb. 272, 95 N. W. 2d 618.

It becomes necessary therefore to examine the evidence and therefrom ascertain whether or not the plaintiffs have sustained the burden of proving that this land is accretion to Lot 1.

It is pointed out here that the original Lot 1 is a narrow strip of land lying along the east line of Section 29, Township 33, Range 2. It does not extend either to the north or to the south line of the section. Its length is north and south and its width is east and west. Lot 1

was originally the western end of St. Helena Island, an island in the Missouri River. The Missouri River in this area comes down generally from the northwest and extends to the east and southeast. At one time in this area the river had two channels, one of which passed to the north of St. Helena Island and the other to the south. In an area which extended upward or westward and northwestward the river channels, in the course of nature, moved about in such manner as to interfere with and at times destroy surface structures of land and to bring into being others. Some of the new structures came into being with suddenness, and others imperceptibly by addition over long periods of time to other structures or by the lowering of the level of the water boundary. In the case here the concern, to the extent it is related to plaintiffs' cause of action, is with the latter, or what is termed accretion.

"Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause." Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57. See, also, Durfee v. Keiffer, *supra.*

Extending westward for about a mile from Lot 1 is an area or strip of land the width of which is not clearly disclosed. The direction of extension is somewhat northwest but since the general direction is westward, west will be employed for convenience. This extension is upstream of the Missouri River. At the upper end of this area the strip narrows for an uncertain distance. This narrower area is referred to in the evidence as the neck. The width of this neck is not certain but there is evidence that the distance across it in 1936 was ¼ mile or more, in 1955 about 156 feet, and in 1958 about 222 feet. Above the neck the land area becomes wider until a width of approximately one and one-half sections of land is reached.

Title to the land extending from Lot 1 to the indicated location about 1 mile west is not in issue in this case. The plaintiffs however contend that this strip of land together with the land to the west thereof and generally described by boundaries as follows is accretion to Lot 1 and that accordingly and on that ground they are entitled to have title thereto quieted in them: The northern boundary starts in section 20 about ¼ mile east of the southwest corner of section 20 and a short distance north of the south line of section 20. (This is about 1 mile northwest of the west end of Lot 1.) From there it follows the high bank of the river generally northward to the north line of section 20, thence north and a little bit east across about the south half of section 17, thence in a general northwesterly direction to a point slightly north of the east and west half-section line of section 7 and about 250 feet east of the township line which forms the west boundary of sections 7, 18, 19, and 30, thence south to a point about 150 feet north of the east and west half section line of section 18, thence in a meandering course but generally in a southeasterly direction to the point of beginning of this description.

It is pointed out again that this description is of land which falls within the description contained in the petition of the plaintiffs and also the description contained in the answer and cross-petition of the defendants.

It perhaps should also be pointed out that the reason for the use of approximations as to distances and locations is that the evidence is not in such condition as to permit, in these areas, a greater degree of certainty.

The right of the plaintiffs to prevail in their action depends upon whether or not they have sustained their burden of proving that the lands in dispute are accretion to Lot 1. This burden required proof that the first mile west was accretion and that the land on to the west was built up by a continuation of the accretion process.

The record discloses that title to Lot 1 was obtained

by William C. Jones in April 1895; that it was transferred by him by deed to Margaret Jones, his wife, in October 1908; that William C. Jones died in November 1913; that Margaret Jones died in February 1935; and that the deed from William C. Jones to Margaret Jones was recorded in August 1936. Without going into further detail it is made to appear, and no one disputes it, that the plaintiffs are the owners of Lot 1 and the accretion, if any, thereto by inheritance and by purchase under an unbroken chain of title extending back to the year 1895.

To prove the cause of action of plaintiffs, seven witnesses were called. Two of these were the plaintiff John Jones and his brother, Joseph Jones. Their ages were respectively 64 and 66 years at the time of the trial. Neither of these witnesses gave any factual testimony as to observations over the years which demonstrated or from which a reasonable inference could flow that the lands in question could be accretion to Lot 1. No other witness gave any such testimony. It is true that witnesses testified as to some topographical conditions and relative variations in the water elevation at different times, but none of this bears a probative relation to accretion.

It is pointed out that the plaintiffs did not call as a witness any surveyor or engineer, and on this account there was no opinion based upon engineering examination and analysis that the land involved here was accretion to Lot 1.

There was a total failure of proof on the part of plaintiffs that the land to which they seek to have title quieted in them was accretion to Lot 1. It follows that for this failure of proof the relief sought by the plaintiffs must be denied.

This failure of proof is sufficient to deny the plaintiffs any relief, but it appears proper to say that competent evidence of the defendants, which is not contradicted by anything else of probative value in the

record, appears to characterize the land in question, if it is in fact in whole or in part accretion, as accretion to land above and not to land below. There was no effort to delineate with certainty what had taken place over the years in the area above, but it was made clear that the westermost line of the area involved was a line between this and other land farther west to which it was attached of which it was an eastern continuation. Whether or not this land to the west at the time on which the testimony of the witness is based was in the nature of a portion of an island does not clearly appear. The same is true of the land involved here. Insofar as the plaintiffs' cause of action is concerned it is of no controlling importance, since as has been indicated if the plaintiffs are to recover they must do so on proof of accretion to Lot 1 and not on any weakness in the title of another. This supports the conclusion already arrived at that the plaintiffs may not be allowed to recover on their pleaded cause of action.

We come now to a consideration of the question of whether or not the defendants or either of them are entitled to have title quieted in them to the land area described in their answer and cross-petition on the ground of adverse possession.

A party, in order to establish title to real property by the operation of the statute of limitations, or in other words by adverse possession, must prove that he has been in actual, continuous, notorious, and adverse possession of the property under claim of ownership during the full period required by the statute. See, Lewon v. Heath, 53 Neb. 707, 74 N. W. 274; Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384; Burket v. Krimlofski, *supra*.

In order to establish title by adverse possession it is not necessary that a party shall prove a complete enclosure nor that he remained continuously on the land for the statutory period, but only that the land was used continuously for the purposes to which it was by its

nature adapted. See, Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; Lewon v. Heath, *supra;* Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504; James v. McNair, 164 Neb. 1, 81 N. W. 2d 813; Thomas v. Flynn, 169 Neb. 458, 100 N. W. 2d 37.

The statutory period for the establishment of title to real estate by adverse possession is 10 years. See, § 25-202, R. R. S. 1943; Ellsworth Corporation v. Stratbucker, 134 Neb. 246, 278 N. W. 381.

It is pointed out here that the defendant Agnes Schmidt makes no claim of any interest in this land in her own right. She is the wife of Henry Schmidt. For the further purposes of this opinion Henry Schmidt will be referred to as the defendant unless there is a departure with attention called to it.

The defendant testified that in 1927 he went on and used for pasture the described land at the upper or west end or immediately east of the township line to which reference has been made herein; that at that time the land area extended about ½ mile eastward and was bounded on the east by water which extended north and south and entirely surrounded the area occupied at that time; that thereafter the land built out and up from the northwest to the southeast and to the north until the entire area described in the answer and cross-petition had been built up; that, without going into great detail but in summary, as it built up he used, occupied, and claimed it as his own; that he used the area for pasture and on it he cleared different areas which he used for the production of crops; that the area thus used, occupied, and claimed was built up at least as early as 1942; and that at no time theretofore or since has he abandoned, surrendered, or released his possession, occupancy, or claim of title to this area.

The testimony of the defendant with regard to possession, use, and occupancy of this land is corroborated by the testimony of other witnesses.

This evidence of possession, use, and occupancy stands

without substantial refutation. There is however some testimony to the effect that the defendant was not occupying the land under claim of ownership but under an oral agreement made with him on behalf of the heirs of William C. Jones or of Margaret Jones for the years 1931 and 1932 by Joseph Jones, a son of William C. and Margaret Jones, and thereafter by John Jones, one of the plaintiffs. The evidence in this connection is that there was no arrangement for rental, but only that there was bare permission given to the defendant to use the land without any reasonably informative evidence as to when or where these incidents took place. This evidence relative to purported agreements was denied by the defendant.

On its face, in the light of the uncertainty and the manner in which this evidence appears, it must be concluded, as undoubtedly the trial court did conclude, that this may not be regarded as credible. In this connection it is pointed out that none of the plaintiffs or their predecessors in interest in Lot 1 ever did or attempted to put to use any of the land claimed by the defendant.

There is evidence that in 1953 the plaintiff John Jones requested a lease upon this land from the defendant or to have the defendant pay $10 or $15 as rental for the land.

The defendant refused to sign the proffered lease or to comply with the request for payment of rent.

There is no evidence of probative value that anyone ever attempted to oust the defendant from possession of the land until August 1953. In August 1953, the plaintiff John Jones requested him to deliver possession on March 1, 1954. There was no compliance with this request. Notice to quit was served in September 1955. Thereafter the plaintiff John Jones instituted forcible entry and detainer proceedings against the defendant to obtain possession of the land. A defense to the action was that the defendant was the owner. The fact that there was resistance in that instance is disclosed

by the opinion in Jones v. Schmidt, 163 Neb. 508, 80 N. W. 2d 289. The record discloses that in each and every instance where there was an effort to oust the defendant from possession of the land in whole or in part there was resistance which was successful.

From the entire record it becomes apparent that within the meaning of the law the defendant possessed and occupied this land under such conditions and for a sufficient period of time as to cause the title thereto to vest in him.

The judgment of the district court is therefore affirmed.

AFFIRMED.

IN RE ESTATE OF OLIVER C. MCVEY, DECEASED. COUNTY OF KEITH, APPELLEE, V. JOHN M. CREAMER, EXECUTOR OF THE ESTATE OF OLIVER C. MCVEY, DECEASED, APPELLANT.
102 N. W. 2d 632

Filed April 29, 1960. No. 34766.

1. **Statutes.** Where a right has been created by statute, which did not exist at common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and limit the right and must be fully complied with in the manner prescribed.
2. **Insane Persons.** There is no common-law liability of a parent for support of an insane relative, and the statutory procedure for determining and fixing such a liability must be strictly followed.
3. ———. Under section 83-352, R. R. S. 1943, providing a procedure for imposing liability on a parent for the care and maintenance of an insane child in a state hospital, investigation and determination by the county board to determine ability of a parent to pay without depriving dependents of necessary support is a condition precedent to the attaching of liability.
4. ———. Where conditions precedent contained in section 83-352, R. R. S. 1943, have not been complied with during the lifetime of a relative sought to be charged, no absolute liability attaches to the relative nor to his estate.

APPEAL from the district court for Keith County: ISAAC J. NISLEY, JUDGE. *Reversed and remanded with directions to dismiss.*

George B. Hastings and *Fred E. Wanek*, for appellant.

Firmin Q. Feltz, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal from the allowance of a claim by the county of Keith against the estate of Oliver C. McVey, deceased, in the amount of $6,067.66 and interest, for the maintenance of Edward Hamilton McVey, a son of Oliver C. McVey, who was committed to the Hastings State Hospital as an insane person.

The case is presented on stipulations of fact. The essential facts are: Edward Hamilton McVey, whom we shall hereafter refer to as Edward, was an adult son of Oliver C. McVey when he was adjudicated insane and committed to the Hastings State Hospital on June 10, 1939. Edward had no estate or income with which to pay the cost of his care and maintenance. Edward remained continuously in the hospital to and after the death of Oliver C. McVey on October 20, 1958. During the times herein mentioned Oliver C. McVey was possessed of an estate and income sufficient to pay the cost of Edward's care and maintenance in the hospital without depriving those dependent upon him of their necessary support. The county of Keith paid the cost of the care and maintenance of Edward in the hospital. There is no dispute as to the correctness of the amount. No attempt was made by the county to collect from Oliver C. McVey during his lifetime. After the latter's death and on November 18, 1958, the county of Keith filed its claim in the estate of Oliver C. McVey, deceased, for the care and maintenance of Edward for the 4 years immediately preceding the death of Oliver C. McVey. The claim was

allowed by the county court. On appeal to the district court the claim was also allowed. The present appeal to this court resulted.

It is the contention of the executor of the estate of Oliver C. McVey, deceased, that the estate of a deceased parent is not liable for the care and maintenance of an insane son in a state hospital where the amount is neither fixed nor determined during the lifetime of the parent. This appears to be the only issue before the court on this appeal.

There was no right at common law to recover the cost of care and maintenance of insane persons from the insane person or his estate, or from the relatives of such person. The claim here arises by statute, section 83-352, R. R. S. 1943, and, it being in derogation of the common law, it must be strictly construed against the county. Where a right has been created by statute which did not exist at the common law, the Legislature may impose restrictions upon the right, and the restrictions imposed are a limitation upon such right. Unless such restrictions are fully complied with in manner prescribed, the right does not exist. Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898.

Plaintiff relies upon section 83-352, R. R. S. 1943, as authority for sustaining this proceeding. It contains these relevant provisions: "If any patient in a state hospital for the mentally ill, or the * * * parent of such patient, is possessed of an estate and income sufficient to meet the expense of the patient's care and maintenance in the hospital without depriving those dependent upon such patient or relative of their necessary support, the guardian, * * * or parent of such patient shall pay to the superintendent of the hospital * * * a sum to be fixed by the Board of Control * * *. If any patient is being maintained * * * and the patient * * * or parent of such patient, is possessed of an estate or income sufficient to meet the expense of the patient's care and maintenance without depriving those dependent upon such patient

or relative of their necessary support, the guardian * * * or parent of such patient shall pay to the county a sum equal to the cost of maintaining the patient * * *. The amounts to be paid under this section shall constitute a claim against the estate of the patient and be collectible therefrom. * * * It shall be the duty of the county board of each county to investigate all unpaid claims and cause action to be brought in the name of the county by the county attorney to recover thereon, where it is probable that some recovery can be made." It will be observed that this statute grants no cause of action in terms against the estate of a deceased parent, although such an action against the estate of the patient is authorized. We point out also that the liability of a parent is a conditional one. An investigation and determination by the county board that the parent is possessed of an estate or income sufficient to meet the expense of the patient's care and maintenance without depriving those dependent upon the parent of their necessary support, is a condition precedent to liability.

It is the contention of the county that a cause of action arose against Oliver C. McVey as each quarterly payment accrued and, such statutory cause of action being remedial, it survives the death of the parent. We do not concur in this view.

Section 83-352, R. R. S. 1943, has a long legislative history. There was a time when the cause of action against a spouse or designated relative did survive by virtue of the language of the then existing statute. Richardson County v. Frederick, 24 Neb. 596, 39 N. W. 621; Richardson County v. Smith, 25 Neb. 767, 41 N. W. 774. But the statute applicable during the period of the present claim contained no language to such effect. We recently construed this statute as follows: "The statute above quoted is indispensable to the cause of action asserted by appellee. It creates a right that did not exist at common law. It requires as a condition

precedent to the existence and enjoyment of the right that the incompetent be possessed of an estate and income sufficient to meet the expense of the incompetent's care and maintenance in the hospital without depriving those dependent upon him of their necessary support. This is not a matter of defense to be pleaded and established by the incompetent or his guardian. It is by the statute made a condition of the right and of the remedy." Clay County v. Bottorf, *supra*. Under such interpretation no obligation accrued against Oliver C. McVey until the conditions precedent had been met, to wit, an investigation by the county board and a determination that Oliver C. McVey was possessed of an estate and income sufficient to meet the expense of the care and maintenance of Edward in the hospital without depriving those dependent upon the parent of their necessary support. This not having been done, the statutory conditions precedent to liability were not complied with and no liability attached during the lifetime of Oliver C. McVey. The liability of Oliver C. McVey, not having been fixed and determined in his lifetime, there is no liability that can afford a basis of claim against his estate.

In the case of Estate of Hahto, 236 Wis. 65, 294 N. W. 500, the Supreme Court of Wisconsin had the same issue under a similar statute before it. The court said: "In support of the claim that the liability of the wife is a fixed liability and attached to her estate, appellant urges that (the statute) creates an obligation upon the wife to support her insane husband regardless of an intermediate determination of the appellant to pay made by the collection and deportation counsel. This contention overlooks the requirements that the determination is to follow giving due consideration to those who may be lawfully dependent for their support upon the property discovered by the counsel in his investigation. * * * In referring to the liability of an inmate for his own support, the words 'or his estate' are used, but these words are missing in the reference to liability of

relatives. It is considered that the legislature did not intend to rest the liability regardless of any and all considerations upon the relatives, but intended to make them liable only after consideration of the circumstances pointed out in the statute had been given which resulted in a determination of the collection counsel that the ability of the relative is such that the obligation or a portion of it ought to be visited upon that relative. An inmate himself during his life and his estate after his death are to account for his care at public expense, but no such absolute arrangement in connection with the relatives' obligation exists. * * * The trial court held that an investigation and a determination with reference to the making of a claim must occur during the lifetime of the relative sought to be charged, and with that we agree." We accept the reasoning in the foregoing case as a correct statement of the law.

Where a right has been created by statute which did not exist at the common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and limit the right and must be fully complied with in the manner prescribed. Duhrkopf v. Bennett, 108 Neb. 142, 187 N. W. 813. The statute, section 83-352, R. R. S. 1943, makes the conditions thereof a prerequisite of the right and the remedy. Clay County v. Bottorf, *supra*. The investigation and determination by the county board of a parent's ability to pay without depriving his dependents of necessary support is a condition precedent to a recovery. Since this condition was not complied with during the lifetime of the parent sought to be charged, no absolute liability attached to the parent nor to his estate. State ex rel. Cromwell v. Panzeri, 76 Ida. 211, 280 P. 2d 1064.

The judgment of the district court is reversed and the cause remanded with directions to dismiss plaintiff's petition at plaintiff's costs.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FRANK H. KUCERA, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
102 N. W. 2d 635

Filed April 29, 1960. No. 34772.

Criminal Law: Trial. It is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not; and an instruction or instructions which, by the omission of certain elements, have the effect of withdrawing from the consideration of the jury an essential issue or element of the case, is erroneous; but where the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining.

ERROR to the district court for Platte County: ROBERT D. FLORY, JUDGE. *Affirmed.*

Wagner & Wagner, for plaintiff in error.

Clarence S. Beck, Attorney General, and *John E. Wenstrand*, for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

Plaintiff in error, Frank H. Kucera, hereinafter called the defendant, was charged by a complaint filed in the justice court for Platte County, Nebraska, with operating a motor vehicle on or about June 21, 1959, on a highway outside of a city or village at a rate of speed exceeding 55 miles an hour between the hours of sunset and sunrise, to wit, at 72 miles an hour, contrary to law. The case was tried to a jury. The jury returned a verdict finding the defendant guilty as charged. The court assessed a fine in the amount of $31 and costs against the defendant. The defendant appealed to the district court. The case was tried in the district court to a jury. The jury returned a verdict finding the defendant guilty. The defendant filed a motion to vacate the verdict and

grant the defendant a rehearing, which motion was overruled by the trial court. The trial court assessed a fine of $35 and costs against the defendant. The defendant brings his case to this court by petition in error.

The record discloses that Claude Whitney, a sergeant connected with the Nebraska Safety Patrol, was on duty on the shift from approximately 4 p.m., June 20, to 2 a.m., June 21, 1959; that he was working traffic on U. S. Highway No. 30 in Platte and Colfax Counties; that he and trooper Earl Dughman had a radar speedmeter unit set up approximately 4 miles east of Columbus, just to the west of the Loup River Public Power Company canal, on the north shoulder of the highway facing southwest, between 25 and 40 feet west of a driveway immediately adjacent to the bridge, and used by the power company to service its canal; that the radar unit must be operated by at least two officers, one in charge of the radar meter and the other to operate a pursuit car; that the two officers in charge keep contact by two-way radio which allows the officers to talk to each other; and that Dughman operated the radar meter and Whitney was in charge of the pursuit car. The pursuit car was situated slightly to the east and generally to the north in the driveway to the Loup River Public Power Company canal, and back in the driveway a distance of approximately 50 yards. The officers in charge of the radar speed meter tested the meter by driving at a constant speed of 55 miles an hour east and west through the radar zone to ascertain if it was working properly, and it was.

Sergeant Whitney testified that he received a radio message from Dughman that a 1950 Chevrolet car traveling east had checked through the radar zone at 72 miles an hour; that at the time the defendant's car passed through the radar beam, this witness was parked facing the highway, looking to the south, and the area in front of him was under his observation; that he saw the car operated by the defendant pass through the immediate

area of the radar zone, and kept defendant's car within his vision during the time that Dughman radioed the message to him; and that the defendant's car did not leave his vision after he saw it passing the radar beam. He further testified that there were no other vehicles in the immediate area which passed through the radar beam at the same time the defendant's car passed through it; that no car followed the defendant's car through the radar beam; and that he followed and stopped the defendant's car, wrote a summons ticket for the defendant to appear in justice court in Platte County, and returned to his station.

On cross-examination this witness testified that he traveled a little over a mile to catch the defendant's car; and that the defendant did mention that a car had passed him between Columbus and the canal and the officer could probably overtake such car which was traveling east. This witness testified on redirect examination that he had no description of the car and would not have known what car to look for if he had pursued it.

Earl Dughman, a member of the Nebraska Safety Patrol and on duty at the same time as sergeant Whitney, that is, from 4 p.m., on June 20, until 2 a.m., on June 21, 1959, testified that he was in charge of the radar speed meter; that he was sitting in his patrol unit approximately 60 feet to the north of the radar unit which was facing in a southwesterly direction; and that his vision was not obscured to the west and was good for approximately three-quarters of a mile to the east. He further testified that about 1 a.m., on June 21, 1959, just before the defendant's car passed through the radar zone he was watching it travel down the highway; that the traffic was light; that the lights of the defendant's car were on; that he watched the car for some distance before it passed through the radar beam; and that he obtained a reading of 72 miles an hour from the radar meter at the time the defendant's car passed

through the radar beam. He further testified that he notified Whitney by radio, and Whitney acknowledged his communication; and that there was no other car passing from the east at the time the defendant's car passed through the radar beam.

On cross-examination this witness testified that when a car passed through the radar zone the speed of that vehicle would be registered at that time, and when that car passed out of the scope of the radar meter, if a second car was still within the scope of the radar meter the machine would register the speed of the second car passing through the radar zone; and that if the second car was going faster than the first car, and entered the radar zone while the first car was partly, or any distance, within the radar zone, the radar meter would read the first car until it got out of the scope of the radar zone, then the second car's speed would be registered by the radar machine.

On redirect examination this witness testified that when a car passes through the 170-foot radar beam, it is a fair statement to say that the radar meter will register the first car passing through until that car gets out of the radar beam, and then the radar meter picks up the second car if it is within the beam or just entering the radar beam. On recross examination this witness testified that if the second car would tie the first car, and then pass it at the point of the radar beam, the radar speed meter would stop reading the first car and register the speed of the second car passing through the radar beam.

The defendant, John F. Holub, and John G. Kucera are musicians. On the evening of June 20, 1959, they were entertaining in a tavern in Columbus. They were required to be out of the tavern by 1 a.m. When they left Columbus they were all sitting in the front seat of the defendant's car. Holub was to the defendant's right, John G. Kucera was to Holub's right, and the defendant was driving the car.

The defendant testified that he owned a 1950 Chevrolet car and had owned it for over 4 years; that the speedometer of this car registered 85,000 miles; that when he drove his car from Columbus, he drove on the Lincoln Highway; that while doing so, two cars passed him; that the first car passed him about 1 mile west of the canal, and the second car passed him right close to the canal; that the cars were close together; and that the second car passed on the left side of him just west of the canal. When the second car had passed them, Holub said: "Look at that boy going. * * * Here we go only 47 miles, and look at him where he is already." He further testified that the speed of his car was 46 or 47 miles an hour; that he always kept the speed of his car under 50 miles an hour; that the patrol officer stopped him not quite a mile from the canal; that after the officer stopped him he rolled the window of his car down and told those riding with him he wondered what had happened, it must be a taillight; and that he asked the officer what the trouble was and the officer told him that the radar meter registered the speed of his car at 72 miles an hour, and that he was speeding. The defendant told the officer that two cars had passed him at a high rate of speed, but the officer would not listen to him and requested his driver's license which he gave to the officer. The defendant further testified that after his arrest he tested his car for speed and got it up to 65 miles an hour and it sputtered and missed; that he could not get it to a speed of 70 miles an hour; and that he never drove over 50 miles an hour.

John F. Holub testified that after he, the defendant, and John G. Kucera left Columbus in the defendant's car and proceeded down the highway, a car passed them at a speed of about 80 miles an hour while defendant's car was going at 47 miles an hour; and that as they arrived near the canal another car passed them. After proceeding almost a mile beyond the canal, a patrol officer drove along beside them and stopped them. This

witness asked the patrol officer what the trouble was, and he said "speeding." This witness told the patrol officer that he was mistaken. He further testified that the defendant's car was traveling at a rate of speed of 47 or 48 miles an hour. He also testified that at no time when he looked at the speedometer was it ever showing over 50 miles an hour.

John G. Kucera testified that when the patrol officer stopped the defendant's car, the defendant told the officer about the two cars which had passed his car; that the cars were going very fast between Columbus and the canal, and were ahead of him; that the officer had the wrong car; and that the officer should catch the cars which had passed the defendant. He further testified that the two cars which passed the defendant's car were going very fast. This witness could not tell the make of the cars that passed the defendant's car, but the license plates showed they were from county 43. One of the cars passed the defendant's car about a mile west of the canal and the second car passed the defendant's car right at, or just west of, the canal. Holub said: "Look how this man is traveling." Holub then looked at the speedometer and said: "We are going only 47 miles an hour, * * *." This witness also looked at the speedometer and it indicated 47 miles an hour. He further testified that the defendant usually kept the speed of his car between 45 and 50 miles an hour; and that the defendant's speed just before his car was stopped by the patrolman was 47 miles an hour.

The defendant predicates error on the giving of instructions Nos. 1 and 6. The defendant also predicates error on the failure of the court to instruct on the issue as to whether the speed registered on the radar meter was reflected by the defendant's car or by another car. Other assignments of error are interrelated to the above and need not be set forth.

The defendant contends that the real issue in the case is, did the defendant's car go through the radar

zone at the same time as another car, and did the other car make the record as shown on the radar meter? The defendant also contends that the trial court failed to present that issue to the jury, and consequently withdrew the real issue from the jury.

Instruction No. 1, in part, charged the jury in the language used by the complaint, stated that the defendant pleaded not guilty, and that the trial was for the purpose of determining his guilt or innocence. The statement in instruction No. 1 was purely informative and true. There was no error in this instruction. See Smith v. State, 169 Neb. 199, 99 N. W. 2d 8.

Instruction No. 6 given by the trial court reads as follows: "The laws of Nebraska provide that the speed of any motor vehicle being driven upon any public street or highway may be determined by the use of radio-micro waves or other electronic device, and that the results of such determination shall be accepted as prima facie evidence of the speed of such motor vehicle in any court of (sic) legal proceedings where the speed of the motor vehicle is at issue. Such electronic devices are what is commonly called radar.

"Prima facie evidence is such evidence as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.

"This does not mean that testimony, based upon the use of radar, is necessarily conclusive proof of the speed of the defendant's vehicle, but it is your duty to weigh such evidence together with all other evidence in relation to the guilt or innocence of the defendant, giving it such weight as it is entitled to receive under all the facts and circumstances. Neither does such evidence have the effect of shifting the burden of proof, which is always upon the State to prove the guilt of the defendant beyond a reasonable doubt."

Section 39-7,108.02, R. S. Supp., 1957, provides in part: "The speed of any motor vehicle being driven upon any public street or highway may be determined

by the use of radiomicro waves or other electronic device. The results of such determinations shall be accepted as prima facie evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue."

It will be noted that instruction No. 6 corresponds in part to the section of the statute as above set out.

The defendant's position is that the court was under a mandatory duty to give an instruction on the defense that a car other than the one belonging to the defendant went through the radar zone and registered the speed of 72 miles an hour, and the court's failure to do so constituted prejudicial error.

The defendant did not tender any instructions to the district court.

This court in Planck v. State, 151 Neb. 599, 38 N. W. 2d 790, quoted with approval from Jones v. State, 147 Neb. 219, 22 N. W. 2d 710, as follows: " 'The rule is well established that it is the duty of the court to instruct the jury on the law of the case, whether requested so to do or not; and an instruction or instructions which, by the omission of certain elements, have the effect of withdrawing from the consideration of the jury an essential issue or element of the case, is erroneous; but where the jury is instructed generally upon the law, and when the instructions given do not have the effect above stated, then error cannot be predicated upon the failure of the court to charge upon some particular phase of the case unless a proper instruction was requested by the party complaining.' " See, also, Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868; Smith v. State, *supra.*

In Smith v. State, *supra,* this court said: " 'Where the trial court has instructed generally as to the issues in a criminal prosecution, error can not be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining.' Martin v. State, 67 Neb. 36, 93

N. W. 161. See, also, Frades v. State, 131 Neb. 811, 270 N. W. 314."

From an analysis of the entire charge to the jury in the instant case, we conclude that the instructions complained of do not constitute prejudicial error.

The jury heard all of the evidence and determined that the defendant was guilty as charged. We find no prejudicial error in the record. The judgment of the trial court should be, and is, affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CLARENCE S. BECK, ATTORNEY GENERAL, PLAINTIFF, V. PHILIP B. LUSH ET AL., DEFENDANTS.
103 N. W. 2d 136

Filed May 6, 1960. No. 34257.

1. **Judgments.** A judgment or decree rendered by consent of the parties is valid if requirements establishing its validity have been met.
2. ———. A consent decree is as much a final decree and as conclusive upon the parties as is one which has been rendered after a hearing on the merits.
3. **Injunctions: Contempt.** An injunction granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished as a contempt by the court.
4. **Injunctions.** A party who has knowledge of an injunction and is in privity with a party enjoined is bound thereby.

Original action. On stipulation for consent decree. *Consent decree approved.*

Clarence S. Beck, Attorney General, *Robert A. Nelson,* and *John S. Samson,* for plaintiff.

Crosby, Pansing & Guenzel and *Chauncey E. Barney,* for defendants.

Heard before MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an original action which was instituted by the State of Nebraska on relation of Clarence S. Beck, Attorney General, plaintiff, against Philip B. Lush; Gail A. Clinkenbeard; Grand Lodge Brotherhood of Railroad Trainmen; Subordinate Lodge No. 853, Falls City, Nebraska; Subordinate Lodge No. 400, Fairbury, Nebraska; Subordinate Lodge No. 190, Chadron, Nebraska; Subordinate Lodge No. 170, Lincoln, Nebraska; Subordinate Lodge No. 134, Grand Island, Nebraska; R. J. Groves; F. A. Arnold; W. G. Griffin; D. G. Klein; and W. Stull, defendants. The defendant Lush is a lawyer who was, until January 1, 1956, the legal regional representative of the defendant Grand Lodge Brotherhood of Railroad Trainmen in Minneapolis, Minnesota, which organization is located in Cleveland, Ohio, with subordinate organizations or lodges in the State of Nebraska and elsewhere; the defendant Clinkenbeard is a regional investigator of the Grand Lodge; the named defendant subordinate lodges are representatives of the Grand Lodge; and the remaining named defendants are the representatives of the designated subordinate lodges. Other defendants were named in the proceedings as originally instituted but they have not been brought before the court by legal process and there has been no general appearance by them in the action.

The action was instituted on May 10, 1957, by the filing of an information, an affidavit, and a motion for a citation of the defendants for contempt of court. These were filed on behalf of the plaintiff by Clarence S. Beck, Attorney General, as relator. Hereinafter the State of Nebraska will be referred to as plaintiff.

The basis of the action will not be set out in great detail. Only sufficient of it will be related herein to adequately present an understanding of what is presented at this time. The action at its inception was twofold. First, it was charged in the presentation that the defendant Lush as an attorney at law and regional

representative of the Grand Lodge Brotherhood of Railroad Trainmen, Clinkenbeard as representative of the Grand Lodge, the five defendant subordinate lodges through their representatives who were the other named defendants, and these five defendants had engaged in the practice of soliciting in the State of Nebraska of persons having claims against railroads to allow themselves to be represented in actions to recover on the claims against the railroads by attorneys and agents of the choice of the defendants, contrary to law and to the established ethics of the legal profession. On this account it was charged that the defendants were in contempt of court.

In the second phase it was substantially charged that the defendants were and would continue to be engaged in the unlawful and unethical practices which were the basis for the charge of contempt. On this account the plaintiff sought injunctive process to prevent and prohibit these practices.

In the action issues were joined and other proceedings had which do not require description herein. After these proceedings were had and in April 1960, the plaintiff by its attorney and the defendants by their attorneys entered into a stipulation for the rendition and entry of what is termed a consent decree which if rendered and entered will fully dispose of the issues presented which have been briefly described herein. The proposed decree was presented with the stipulation, and consent thereto is recited therein.

Under the law of this jurisdiction a judgment or decree rendered by consent is valid if requirements establishing its validity have been met. This subject was discussed at length in McArthur v. Thompson, 140 Neb. 408, 299 N. W. 519, 139 A. L. R. 413. In the opinion the following was quoted with approval from 19 Am. Jur., Equity, § 407, p. 280: " 'Decrees are frequently entered on consent of the parties; and where this practice has been followed, the fact should be recited in

the decree. Having been entered, such a decree is binding on the consenting parties; it cannot be reviewed except on a showing that consent was obtained by fraud or that the decree was based on mutual error. A consent decree is as much a final decree and as conclusive upon the parties as is a decree which has been rendered after a hearing on the merits.'" See, also, Clark v. Charles, 55 Neb. 202, 75 N. W. 563; 49 C. J. S., Judgments, § 178, p. 314.

Examination of the issues presented by the pleadings and an application thereto of the law and of the Canons of Professional Ethics discloses that the proposed decree contains the essential requirements to the validity of a consent decree. Among other requirements, not necessary to set out here, the acts which are the subject of the proposed decree are, under law and the Canons of Professional Ethics, subject to the injunctive processes no matter by whom committed.

The following from the proposed consent decree contains the disposition of the issues which were before the court for consideration before the presentation of the stipulation and the proposed decree:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

"(1) That motion for citation for contempt be and the same is hereby dismissed as to each defendant.

"(2) That in the procurement of a case within the State of Nebraska the defendants, Grand Lodge Brotherhood of Railroad Trainmen, Subordinate Lodge No. 134, Grand Island, Nebraska; Subordinate Lodge No. 170, Lincoln, Nebraska; Subordinate Lodge No. 190, Chadron, Nebraska; Subordinate Lodge No. 400, Fairbury, Nebraska; Subordinate Lodge No. 853, Falls City, Nebraska, Gail A. Clinkenbeard, R. J. Groves, F. A. Arnold, W. G. Griffin, D. G. Klein and W. Stull and all persons acting by, through and under them or either of them are hereby jointly and severally permanently enjoined and restrained from:

"a. Telling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Nebraska;

"b. Negotiating or attempting to negotiate contracts of employment for legal services on behalf of any lawyer or lawyers;

"c. Accepting pay or any gratuity or benefit whatsoever, directly or indirectly, from any lawyer, person or organization for services in obtaining contracts of employment for legal services;

"d. Loaning or advancing or promising to loan or advance money to any person or his representative pending trial or settlement of his claim or suit either personally or for or on behalf of any other person;

"e. Displaying, exhibiting, or showing copies or photographs of checks, releases, newspaper accounts or other data concerning settlement made on behalf of other claimants for the purpose of inducing any person, or his representatives, or which may tend to induce said person, to enter into contracts for the legal services of any lawyer;

"f. In any way or any manner in concert with any resident or nonresident lawyer conspire to violate the laws of Nebraska or the Canons of Legal Ethics imposed by the Courts on lawyers licensed to practice law in the State of Nebraska.

"g. In any way or in any manner violate or aid or abet the violation of the provisions of Paragraph (2) of this decree.

"(3) That in the procurement of a case within the State of Nebraska the defendant, Philip B. Lush as an individual and as a lawyer admitted to the practice of law within the State of Minnesota, and all persons acting by, through or under him, in any way or in any manner, either personally or by or through an agent, servant, employee, partner, or associate is hereby jointly

and severally enjoined and restrained from:

"a. Improperly and illegally soliciting employment as a lawyer in the State of Nebraska;

"b. Paying any person, either directly or indirectly, for services rendered in obtaining or soliciting such contracts of employment within the State of Nebraska, or accepting any such employment or any benefit derived from any such solicitation;

"c. Promising to loan or advance, or loaning or advancing, money to any person or persons at any time for the purpose of inducing said person or persons to employ said defendant, either jointly or severally;

"d. Making unsolicited calls on any person for the purpose of soliciting contracts of employment;

"e. Violating the laws of Nebraska concerning the practice of law within the State of Nebraska or Canons of Legal Ethics imposed by the Supreme Court of Nebraska, required of and observed by resident lawyers licensed in the State of Nebraska;

"f. In any way or in any manner violate or aid and abet the violation of the provisions of Paragraph (2) of this decree."

It becomes apparent from an examination of the pleadings, the stipulation, and the proposed decree that if the decree is entered that all of the purposes of the action will have been accomplished except that portion relating to the matter of contempt on or before May 10, 1957.

This abandonment by the plaintiff of the effort to hold the defendants for alleged acts committed before May 10, 1957, in view of the injunctive provisions of the decree, if rendered, and the effect thereof, it is thought, should not militate against the rendition of the decree on the basis of the stipulation.

Section 25-1072, R. R. S. 1943, provides in part: "An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or by any judge

who might have granted it in vacation."

In interpretation and application of this statutory provision this court has said: "The first point raised is that, as she was not made a party to the injunction proceedings, she is not bound by the orders therein. We cannot sustain her in this, as it has too frequently been held that one who has knowledge of an injunction and is in privity with the party enjoined is bound thereby." Wilcox v. Ashford, 131 Neb. 338, 268 N. W. 81.

It is therefore the opinion of this court that the proposed decree presented with the stipulation of the parties should be and it is hereby approved and it shall be considered as rendered and entered by this court on being signed by one of the members of the court.

CONSENT DECREE APPROVED.

GERTRUDE NICHOLS, ADMINISTRATRIX OF THE ESTATE OF DUANE NICHOLS, DECEASED, APPELLEE, V. J. EMMETT MCARDLE, APPELLANT, IMPLEADED WITH STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

102 N. W. 2d 848

Filed May 6, 1960. No. 34692.

1. **Automobiles: Highways.** There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching and entering a favored highway intersection acted with due care.
2. ———: ———. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it.
3. **Highways.** A user of highways may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary.
4. **Automobiles: Highways.** A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.

5. ———: ———. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view.
6. ———: ———. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger.
7. ———: ———. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law.
8. ———: ———. A motorist approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and the failure to see such favored automobile is negligence as a matter of law.
9. **Evidence: Trial.** If a litigant without reasonable explanation testifies to facts substantially different concerning a material issue than had previously been testified to by him in another action, the change being to meet the exigencies of the pending action, the evidence is discredited as a matter of law and should be disregarded.
10. **Negligence.** Negligence, which is the moving or effective cause of a happening, is the proximate cause thereof.
11. **Trial: Appeal and Error.** The trial court is required to submit to the jury for its determination only the issues of fact presented by the pleadings and supported by evidence, and it is generally prejudicial error for the trial court to present to the jury for its determination any issue of fact for which there is no proof.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

Fraser, Wenstrand, Stryker, Marshall & Veach, Joseph Polack, and *O'Sullivan & O'Sullivan,* for appellant.

Wear, Boland, Mullin & Walsh and *A. Lee Bloomingdale,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Gertrude Nichols as administratrix of the estate of Duane Nichols, deceased, seeks to recover by this litiga-

tion damages for the wrongful death of her husband, Duane Nichols, in the collision of an automobile operated by him with an automobile driven by appellant at or near the first intersection of highways south of the Waterloo overpass over the tracks of the Union Pacific Railroad Company on U. S. Highway No. 275, which collision and death were, as it is alleged, caused by the negligence of appellant.

The State of Nebraska, Department of Roads, was the employer of Duane Nichols at the time of his death and was made a party to the litigation because of subrogation rights it might have by virtue of the Workmen's Compensation Act of the state. It is named as appellee but it asserts no rights or interest in this appeal and will not be again mentioned herein. Gertrude Nichols as administratrix of the estate of Duane Nichols, deceased, will be designated as appellee and her decedent will be mentioned as deceased. The Ford automobile operated by the deceased at the time of the collision is described in the record as the patrol car and will be referred to as the Ford. The automobile driven by appellant at that time will be identified as the Chevrolet.

The collision of the Ford and the Chevrolet occurred at about 4:30 p. m., July 24, 1958, on U. S. Highway No. 275, hereafter spoken of as highway No. 275, at or near the first intersection of highways south of the Waterloo overpass and it was the cause of the death of the deceased. The heirs at law and next of kin of deceased are his widow and three minor children the ages of whom at the time of the collision were, respectively, 32 years, 9 years, 7 years, and 3 years, each of whom was dependent on deceased for their support and maintenance. The deceased was then 31 years of age; had a life expectancy of 40 years; was able-bodied, well trained, earning an income of about $4,800 per year; and was rendering valuable service, help, assistance, and support to his wife and children of which they were deprived by his wrongful death.

The specifications of negligence charged against appellant by appellee included in substance the following: Failure to stop his automobile before going upon highway No. 275; failure to make a proper turn upon said highway; his act in turning into and traveling upon the east lane of the highway south of the intersection while deceased was properly occupying and using the east lane, moving therein toward the north; failure to have and maintain a proper lookout for traffic and especially the vehicle driven by deceased on highway No. 275; failure to have his automobile under proper control and to respect the right-of-way of deceased; and the operation of his automobile on the east lane of highway No. 275 in disregard of his duty to traffic moving from south to north thereon. Appellee asserted that the acts and omissions of appellant mentioned in the specifications of negligence were a violation of the laws of the state.

The first cause of action of appellee seeks damages because of the alleged wrongful death of the deceased and the second cause of action is for the recovery of burial expense occasioned by his death.

The substance of the defense of appellant was a denial of the claims of appellee and a plea of contributory negligence of the deceased of a nature and in a degree sufficient to defeat and bar any recovery in the case by appellee. Appellee traversed the plea of contributory negligence made by appellant.

When the evidence was completed the trial court charged the jury that the evidence produced on the trial established that deceased was exercising due care and was free from contributory negligence at the time of the collision; that the death of deceased was proximately caused by negligence of appellant; that appellee was entitled to a verdict of the jury for the amount of damages, if any, caused the widow and children of the deceased which a preponderance of the evidence established they suffered by reason of the wrongful death

of the deceased; and that the only question for the jury to determine in the case was the amount it would award appellee on her two causes of action. The verdict was a recovery by the appellee on each of the causes of action. Appellant made a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial, he having made a motion for a directed verdict at the conclusion of the evidence, which was denied. Judgment was rendered on the verdict and this appeal presents the record for review.

The motion of appellant for a new trial specified nearly a score of errors claimed to have occurred to the prejudice of appellant at the trial. His brief in this court assigns numerous errors. Appellant in his brief and during his argument at the submission of the case discussed only the alleged error of the trial court in resolving all issues in the case in favor of appellee as a matter of law except the amount, if any, appellee was entitled to recover a verdict for against appellant. In this posture of the case the issue on this appeal is whether the evidence establishes as a matter of law that the negligence of appellant was the sole, proximate cause of the collision resulting in the death of the deceased. If it does, the judgment must be affirmed.

Highway No. 275 extends north and south for a considerable distance on either side of the intersection near which the collision of the automobiles occurred and the town of Waterloo is a short distance north from it. Highway No. 275 has two concrete paved lanes each 10 feet wide, divided by a black line in the center of it. It is a level road from a considerable distance south of the place of the collision to a distance north thereof and the grade of the highway to the north then gradually rises until it attains an elevation of about 32 feet at the high point on the overpass which is about 875 feet north of the place of the accident and is known as the Waterloo overpass.

There is a graveled road which extends from north-

east to southwest on a slight angle near highway No. 275 but to the southeast of it. The graveled highway extends to and joins highway No. 275 at the east edge of the paved portion of it about 875 feet south of the south end of the Waterloo overpass. The graveled road about 100 feet from where it joins highway No. 275 curves or turns quite sharply to the right and joins highway No. 275 at a slight angle to the southwest but at substantially right angles. The graveled road terminates there. It was at or near the south line of the intersection of the two highways that the collision of the automobiles occurred which caused the death of the deceased. He approached the intersection from the south and appellant came to and on it at an angle to the southwest. The graveled road was substantially level with the paved portion of highway No. 275. There was a highway stop sign regulating traffic traveling on the graveled road toward highway No. 275. The angle on which it and the intersecting road approached each other was such that either of the motorists as they came to the intersection had a clear, unobstructed view of each other, the intersection, and its surroundings for an extensive distance.

A motorist traveling south on highway No. 275 soon after 4 p.m. the day of the tragedy said at the trial that as he came over the overpass at a speed of about 30 miles per hour there was a truck to the rear of him moving toward the south a distance of from 75 to 100 yards; that there was no traffic in front of him going south; that there were three or four vehicles to the south of witness traveling to the north; that the nearest approaching vehicle of that group was an automobile which afterwards was identified as the Ford operated by the deceased traveling at a speed of about 50 miles per hour a distance south of the place of the collision estimated by the witness to have been about 200 or 300 yards; and that witness first saw the Chevrolet going southwest on the traveled road when it was 20 or 30 feet from

highway No. 275 and he watched it continuously until the collision of it and the Ford. The Chevrolet was continuously in motion during the time it was observed by the witness. The Ford was, the witness thought, about 100 yards south of the place of the collision when he first saw the Chevrolet. However, the witness identified the location of the Ford at the time he first saw it by a post on the east side of highway No. 275 which continued there until the time of the trial and an actual measurement showed the distance was 176⅓ feet instead of about 200 or 300 yards as the witness estimated in his testimony. The Chevrolet was traveling quite fast when the witness first saw it but its speed was decreased and then suddenly increased "and the car spurted out." The witness said that he then knew there was going to be an accident and he shouted a warning. He was then 50 or 60 feet from the place of the collision and he immediately applied the brakes on his car as he saw the Chevrolet start accelerating its speed after it had slowed down. It reached the pavement on highway No. 275 and the accident immediately occurred. The Ford was traveling in the east lane continuously from the time witness first saw it to the time of the collision. It was only seconds from when the witness first saw the Chevrolet until the automobiles collided. The front of the Chevrolet was only a few feet from the east side of highway No. 275 when its speed was decreased and then suddenly accelerated. The Ford was something like 50 feet south of the place of the collision of the automobiles when the Chevrolet was on the extreme south or left side of the graveled road as it came on an angle to the southwest and entered highway No. 275 on its east side. The collision occurred immediately thereafter. The Ford was moving due north and the Chevrolet was traveling at a slight angle to the southwest, more south than west, as they met almost head-on in the east lane of highway No. 275. The Ford

was traveling about 50 miles per hour during the entire time it was observed by the witness.

A traveler who saw the collision of the Ford and the Chevrolet testified in substance: He was going north on highway No. 275 about 4:30 p. m. on July 24, 1958. Preceding him was a truck. A highway patrol car passed the witness and the truck about 300 yards south of the place of the accident. Witness then passed the truck and thereafter he maintained a speed of about 50 miles per hour. The patrol car was the Ford above mentioned and it was from 150 to 175 feet ahead of the witness after he passed the truck. The distance between them continued about the same until the time of the accident. The Ford was in the east lane of highway No. 275 and continued therein at a speed of about 50 miles per hour until the time of the accident. The witness first saw the Chevrolet on his right coming from the east when the Ford was probably 150 feet south of the place of the contact of the automobiles. The Chevrolet was then near highway No. 275, in motion at a moderate speed, and it did not stop after the witness first saw it. When the front of the Chevrolet was at the east edge of highway No. 275 the Ford was probably from 20 to 25 feet from the place of the accident and instantly the automobiles collided. The witness saw the brake lights on the Ford flash red and at practically the same time the collision happened.

A driver of a truck, traveling south on highway No. 275 near the south end of the Waterloo overpass at about 4:30 p. m. on the day of the accident, saw the collision. He first saw the Ford when it was an estimated distance of 300 yards south of the place of the collision, traveling north at a speed of about 50 miles per hour. When the Ford was probably 150 feet south of the place of the accident, witness saw the Chevrolet traveling from his left going southwest toward and near highway No. 275. When the front of the Chevrolet was about at the east edge of the highway the Ford

was an estimated 75 feet south of the place of the collision. Witness said the time between when he first saw the Chevrolet until the accident happened was like the time required to snap one's fingers. The Chevrolet did not stop from the time the witness first saw it until the accident. The collision of the automobiles was almost head-on notwithstanding the Ford was going due north and the Chevrolet was moving to the southwest on a slight angle.

The evidence locates the place of the collision of the automobiles in the east lane of highway No. 275 and somewhat south of the south line of the traveled portion of the road on which appellant traveled as it comes to and joins the east side of highway No. 275. There was a considerable quantity of debris in the east lane of the highway at the place of the accident, and north of it a few feet was a fresh mark or gouged out place in the pavement. One of the bumper guards of the Ford was knocked down. There were tire skid marks about 20 feet in length extending from the south to the north except at or near the end where they terminated and at that place they veered to the west and ended near where the Ford came to rest. The Ford after the collision was facing southwest in the west lane of highway No. 275 and about 7 feet north of it the Chevrolet was in the west lane facing northwest.

Appellant testified he was operating his 1954 Chevrolet on the day of the accident from Waterloo on the graveled road which extends from northeast to southwest and is easterly from but not parallel with highway No. 275. He said as he came to the part of that road where it turned westerly onto highway No. 275 he stopped at the stop sign to his right. He then drove onto highway No. 275. He said he did not know whether he looked to the right or to the left. He was asked if he saw the patrol car and his answer was: "From then on I don't know anything." He did not know whether he hit the Ford and did not remember any impact,

crash, or collision. There was no additional effort of appellant to explain or account for the collision of his Chevrolet and the Ford.

Appellant testified by deposition before the trial of this case in other litigation against him resulting from the collision herein involved that he had no remembrance or knowledge of anything that happened prior to, at the time of, or after the accident, the subject of this litigation, except "I recall laying there and seeing people going by and looking. I knew there was something up." This obviously refers to an event after the collision. When appellant was asked if he had any recollection about the collision or what happened he answered he could not remember anything of it. Later in his testimony he said he did not know anything about the accident or what happened prior to it. He in substance repeated that near the end of his testimony in the present case after he had said previously that he remembered he stopped at the stop sign near the intersection of the road on which he traveled with highway No. 275.

In the Chevrolet riding with appellant was James Edward Rodgers, herein called Rodgers. He joined appellant at Waterloo and said the trip was uneventful until they approached the intersection of the road they were traveling on with highway No. 275. Rodgers would not say that appellant stopped at or because of the stop sign on the right side of the road on which they were traveling. He estimated the speed of the Chevrolet on the trip was from 20 to 25 miles per hour. He said as appellant approached highway No. 275 but before he got to the intersection he decreased the speed of his automobile and slowed down. Then suddenly the automobile lunged to pull onto the highway. He testified the Chevrolet was slowed down before it reached highway No. 275 and then the speed of it was suddenly increased as it went onto the highway and continued at the accelerated speed until the collision. He said there was no reason apparent for what appellant did at that

time. Witness saw the Ford and instantly the collision happened.

The automobiles collided some feet south of the south line of the intersection wholly in the east lane of highway No. 275. It was almost a head-on contact of the automobiles. Deceased was operating the Ford traveling north in the east lane of the highway at a speed estimated by all of the testimony on the subject at not more than 50 miles per hour. He was and had been for several years fully informed concerning the highway, its intersections, the stop sign for the control of traffic from the graveled road mentioned herein to and upon the intersection near which the tragedy concerned herein occurred, and all of the surroundings of the intersection. It was an open one and any traveler within the vicinity of it had an opportunity for clear and unobstructed vision for an extensive distance desired by a traveler towards or upon the intersection. The accident happened in the daytime while favorable and pleasant conditions existed. There was no evidence that deceased was not exercising due care in the operation of the Ford on highway No. 275, a favored road, on the day of and at the time of the collision. In this situation a presumption prevails that the deceased was exercising due care. There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching a favored highway intersection acted with due care. Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352. The deceased as a traveler on a favored highway approaching an intersection protected by a stop sign of which he had knowledge was legally privileged to assume that oncoming traffic would obey the stop sign and perform all other obligations imposed by law upon any traveler about to enter upon such an intersection before he did so. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner; and until he has such warn-

ing, notice, or knowledge, he may govern his acts in accordance with such assumption. Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Egenberger v. National Alfalfa Dehydrating & Milling Co., 164 Neb. 704, 83 N. W. 2d 523; Bell v. Crook, *supra.*

Appellant as he approached the intersection was to the right of the deceased. When the Chevrolet was near to the intersection appellant decreased the speed he had been traveling as if he were going to stop but instead he suddenly accelerated the speed of his automobile, drove onto the intersection and south into the east lane of highway No. 275, and collided almost head-on with the Ford. There is undisputed evidence that the Ford was only about three car lengths or 50 feet from the place of the collision when appellant accelerated the speed of the Chevrolet and drove it into the path of the Ford as it was traveling north at about 50 miles per hour. This was graphically expressed by an eyewitness who said that appellant "no sooner hit the pavement than he hit the Patrolman." The conduct of appellant instead of tending to warn or indicate to deceased that appellant was intending to enter the intersection in front of deceased, on the contrary, because of the slowing down of the Chevrolet, was an indication that appellant was going to stop and give the deceased safe passage across the intersection. The view of appellant to the south down highway No. 275 as he approached the intersection was unobstructed for an extensive distance. Appellant by his admission was very familiar with the intersection, knew that highway No. 275 was the principal highway in that area, and that it carried heavy and frequent traffic. The hazard of entering that highway from the secondary road at the time appellant did was obvious. There were the Ford; another automobile; and a large truck, a tractor and trailer unit, traveling toward the intersection. Each of them apparently was traveling at about the same speed, 50 miles per hour. The companion of appellant, James

Edward Rodgers, said that as the automobile of appellant was coming to the intersection he, Rodgers, saw an automobile going north on highway No. 275 cross the intersection: "—it just flashed across."

Appellant does not claim that he looked either to the right or the left when he came to and drove upon highway No. 275 with total disregard of the traffic then thereon. Appellant was obligated when he approached highway No. 275 which was protected by a stop sign to stop as directed thereby before going upon it, to look both to his right and left, and to permit any traffic to pass which was at a distance and traveling at a speed that was dangerous for appellant to have moved forward onto the highway. Bell v. Crook, *supra*, declares: "The driver of a motor vehicle approaching a highway protected by stop signs must stop before going upon it, look to his left and to his right, and permit vehicles to pass which are at a distance and traveling at a speed that it would be imprudent for the motorist to proceed into the intersection." See, also, Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583; Paddack v. Patrick, *supra*.

Appellant was not only legally compelled to stop and to look in each direction for oncoming traffic on the highway before he went upon it but the duty imposed upon him as a motorist using the public highways was mandatory that he see what was then in sight and could and should have been seen by any normal person reasonably and effectively complying with this obligation.

Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501, states: "The duty of the driver of a vehicle to look for vehicles approaching on the highway implies the duty to see what is in plain sight."

In Cappel v. Riener, 167 Neb. 375, 93 N. W. 2d 36, this court said: "The driver of an automobile entering an intersection of two streets (or highways) is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. * * * If the driver of an automobile entering

an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. * * * The operator of an automobile approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and a failure to see such favored automobile is negligence as a matter of law."

The observation of this court in Dale v. Omaha & C. B. St. Ry. Co., 154 Neb. 434, 48 N. W. 2d 380, is appropriate to this case: "From his testimony and its inescapable inferences the plaintiff came into this intersection in the path of a vehicle which was favored over him. He knew it was coming but a short distance away. If he looked he saw it in time to avoid the collision. It was his duty to look and if he failed to do so the consequences of his failure are his own." See, also, Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607; Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643.

Appellant said while he was a witness that as he came to the part of the road on which he was traveling which turns westerly and joins highway No. 275 he stopped his Chevrolet automobile at the stop sign to his right as it required of any traveler in a like situation. He did not say that he looked to the right or to the left or that he made any effort to advise himself as to the situation of traffic on highway No. 275 at or near that location at that time before he drove his automobile onto the highway and to the collision which resulted in and caused the death of the deceased. Appellant had previously testified in litigation against him pending in another court involving the identical collision that he had no remembrance or knowledge of anything that happened concerning the accident prior to, at the time of, or after it until he came to lying alongside of the road after the collision. He offered no explanation of the

contradictory and inconsistent testimony given by him in the two cases. The assertion made on the trial of this case by appellant that he stopped his automobile at the stop sign before he entered upon the highway is not, under the circumstances, available to him in this litigation. A litigant may not recite upon oath one statement of fact in one judicial proceeding and thereafter, to meet the exigencies of the case in the trial of a different cause, recite an entirely different and inconsistent story. In such a situation the evidence is discredited as a matter of law and will be disregarded. Kirchner v. Gast, 169 Neb. 404, 100 N. W. 2d 65.

However, in the circumstances of this case, if appellant stopped at the stop sign, that fact would not change the result because there is no evidence he looked to advise himself of the traffic situation at or near the intersection. If he did look he did not see what was plainly in view which was not only the Ford but a second automobile and a truck approaching the intersection from the south in close proximity at a speed that made it not only imprudent but disastrous for a traveler to proceed into the intersection. Nothing could excuse his failure to see what was then plainly in view. If he did not see, then it must be concluded that he was not even mildly alert to the situation and hazard; and if he saw and did not avoid a collision, it must be decided he did not have required control. In either event, in the circumstances of this case, the conclusion must be that the default of appellant was the proximate cause of the collision and the results thereof. Armer v. Omaha & C. B. St. Ry. Co., *supra*. Negligence, which is the moving and effective cause of a happening, is the proximate cause thereof. Kennedy v. Chicago, R. I. & P. R. R. Co., 156 Neb. 345, 56 N. W. 2d 446; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701.

Appellant argues that if one is in a place of safety and sees or could have seen the approach of a moving vehicle in close proximity to him and suddenly moves

from the place of safety into the path of such an oncoming vehicle, he is guilty of contributory negligence as a matter of law. It was appellant, not deceased, who was in a place of safety as appellant came toward highway No. 275 which was protected by a stop sign from traffic on the secondary or side road. It was appellant, and not the deceased, who was in a place of safety and saw or was charged with looking and seeing the approach of the Ford on the favored highway when appellant suddenly and quickly propelled his automobile from a place of safety into the path of and in collision with the Ford. The rule to which appellant appeals in this respect affords him no consolation or assistance. So far as he is concerned in this case, the rule is more of a sword than a shield.

Deceased violated no provision of the law of the road. He was in and maintained a correct position on highway No. 275 as he came toward the intersection at a speed of less than the prima facie lawful speed. He was traveling in open country. There was no condition present that required deceased to diminish his speed as he came toward the intersection. Appellant asserts that deceased was coming to a curve and a crest of a hill. The factual assumption in this argument is faulty. The overpass at its high point north of the intersection curves but the south end of the overpass is about 875 feet north of the place of the collision. The overpass was not in any way concerned in the collision.

In Moses v. Mitchell, 139 Neb. 606, 298 N. W. 338, the facts were the defendant was driving on highway No. 275 in the daytime at a speed of 55 miles per hour approaching an intersection with highway No. 130. Plaintiff was traveling in an opposite direction and had stopped incident to making a left-hand turn onto highway No. 130. A third party struck the rear of the vehicle of plaintiff and propelled it into the path of the vehicle of defendant. The court said concerning the speed of the defendant: "The day was clear and visi-

bility was good. Certainly, a speed of 55 miles an hour on a state highway in open country on a clear day is not of itself negligence." The court further observed in the opinion in that case: "As Mitchell approached the Moses car, he observed that it had come to a complete stop to permit him to pass. It was only when he was within 50 feet of the Moses car that he saw the Racine car strike it and shove it into his path. He applied his brakes immediately, the undisputed evidence showing that tire marks were burned on the pavement by the application of his brakes for a distance of 42 feet. That he was faced with a sudden emergency cannot be questioned. All the evidence is to the effect that only two to five seconds elapsed from the time the Moses car was struck until the Mitchell car crashed into it. We do not think that this evidence is sufficient to sustain a finding that Mitchell had a reasonable opportunity to avoid hitting the Moses car."

In Fairchild v. Sorenson, 165 Neb. 667, 87 N. W. 2d 235, the facts were the defendant was proceeding from the south on highway No. 103 at a speed not in excess of 55 miles per hour and was approaching an intersection with another highway. The highway on which defendant was traveling was protected by stop signs. The view to the south at the intersection was unobstructed for 500 feet. Plaintiff's driver came to highway No. 103 from the west and stopped at the stop sign. When defendant was 75 feet from the intersection plaintiff's driver proceeded into the intersection and a collision occurred. The court said: "There is no evidence * * * that the automobile in which the defendants were riding was being operated at any time in excess of 55 miles an hour or that it was being operated in an unlawful position on the highway. There was no evidence from which a reasonable inference could flow that the defendants had notice of danger in entering the intersection at the rate of speed and the manner in which their automobile was being operated as it approached the

intersection until Herman E. Fairchild drove his automobile into it."

In the present case deceased had no notice of danger which required him to reduce his speed below 50 miles per hour until appellant suddenly propelled his automobile into the intersection only an estimated 50 feet in front of deceased. He could hardly be charged with contributory negligence in not avoiding the collision which was clearly caused by the act of appellant.

The defense of contributory negligence on the part of deceased was not sustained by any evidence. The evidence is clear that the negligence of appellant as a matter of law was the proximate cause of the collision. The trial court decided all issues in the case as a matter of law except the issue concerning damages. It is the duty of the trial court to present to the jury only issues presented by pleadings and supported by evidence, and it is generally prejudicial error to submit to the jury issues which are not sustained by evidence. Simcho v. Omaha & C. B. St. Ry. Co., *supra;* Shields v. County of Buffalo, *supra.*

The judgment should be and it is affirmed.

AFFIRMED.

MARIE T. SHANAHAN, APPELLEE, V. STANLEY C. JOHNSON, COUNTY TREASURER, APPELLANT.
102 N. W. 2d 858

Filed May 6, 1960. No. 34732.

1. **Injunctions: Taxation.** A landowner may invoke the aid of a court of equity to enjoin collection of a void assessment against his property to pay the cost of location and construction of a drainage improvement. Knowledge of the proceedings for and completion of the improvement will not estop the owner from avoiding liability for a void assessment, and such an assessment cannot be enforced solely on the ground of benefits of the improvement to the owners of abutting lands.
2. **Counties: Drains.** The power and authority of a county board

to make drainage improvements does not of itself confer power and authority to levy and collect assessments to pay the cost of such improvements.

3. **Counties.** Counties and county boards can exercise only such powers as are expressly conferred upon them by statute, and such grant of powers must be strictly construed and any reasonable doubt of the existence of the powers is resolved against them.
4. **Counties: Drains.** County boards possess limited jurisdiction and they have no power or authority to locate and construct a drainage improvement under Chapter 31, article 1, R. R. S. 1943, and levy assessments to pay the cost thereof unless all of the jurisdictional steps have theretofore been timely taken.
5. ———: ———. The power delegated to a county board to locate and construct drainage improvements and levy assessments for the cost thereof is to be strictly construed against such board, and every reasonable doubt as to the extent or limitation of such power is resolved against the board and in favor of the taxpayer.
6. ———: ———. When the statute prescribes a particular mode in which the county board shall act in the location and construction of drainage improvements and the levy of assessments to pay the cost thereof, such board can only act in the mode prescribed and the enjoyment of the grant of such authority requires a compliance with any condition or restriction of the grant.
7. ———: ———. Under the provisions of Chapter 31, article 1, R. R. S. 1943, a county board cannot physically locate and complete construction of a drainage improvement; pay the contractor in full therefor; thereafter take the statutory steps required by sections 31-105 to 31-111, and section 31-118, R. R. S. 1943; and thereby validly assess the cost of the improvement to abutting landowners.
8. ———: ———. A county board has no statutory power or authority to make a reassessment after the previous assessment to pay the cost of a drainage improvement has been declared void by the final judgment of a court of competent jurisdiction.

APPEAL from the district court for Dodge County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

A. C. Sidner, for appellant.

Kerrigan, Flory & Miller, for appellee.

John L. Cutright, amicus curiae.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, Marie T. Shanahan, brought this action for herself and on behalf of other landowners similarly situated, against defendant, Stanley C. Johnson, county treasurer of Dodge County, seeking to enjoin the collection of allegedly void assessments for drainage improvements made by the county board of Dodge County in straightening and altering Rawhide Creek under the provisions of Chapter 31, article 1, R. R. S. 1943. Plaintiff alleged in substance that after a petition for the improvement had been filed by landowners with the county clerk, and a copy of same had been delivered on April 13, 1955, to the county board, hereinafter called the board, it took certain preliminary steps; approved and levied assessments; let the contract for construction of the improvement; completed its construction; and paid the contractor in full therefor prior to August 25, 1956. However, allegedly, a cause entitled Frederiksen v. Dahl, brought on behalf of plaintiff therein and other landowners similarly situated, was tried in the district court for Dodge County on August 27, 1956, and thereafter a judgment was rendered which found that construction of the project had been completed prior to the trial, but found and adjudged that by reason of a jurisdictional defect, all proceedings had and done by the board on and after April 13, 1955, were void and a nullity, including any levy of assessments against any real estate based upon such proceedings. Defendants therein, who were the county clerk and the defendant herein, were then perpetually enjoined from performing or attempting to perform any action toward collecting or receiving any such assessments; the assessments then on file with defendant county treasurer in connection with such project were declared void; and the liens and clouds upon the titles to real estate therein referred to were

declared void and of no effect as to all property which had been purportedly assessed to pay for such improvement.

Plaintiff alleged that such judgment was not appealed from but has at all times remained in full force and effect since September 7, 1956, and that, as ordered by the board, all such void assessments as had been paid were refunded to the landowners.

Plaintiff then alleged in substance that on September 6, 1956, and thereafter, the board, having accepted as final the court's decision heretofore set forth, again attempted to comply with Chapter 31, article 1, R. R. S. 1943, by following the statutes and taking the procedural steps required by it from and after the filing of the original petition for the project on April 13, 1955, without making any changes in the construction work which had been theretofore completed; that thereafter the county surveyor filed with the board a cost estimate and specifications for the project, together with an assessment of benefits, after which the county clerk set a date for hearing on assessments and served notices thereof on landowners whose lands were so purportedly assessed for such improvement project. Allegedly thereafter the board purportedly approved such new assessments and directed the county clerk to advertise for sealed bids for construction of the ditch, and pursuant thereto a purported letting was held April 10, 1957, whereat the board let a contract to the original contractor, who was sole bidder, on a bid of $39,474.84, exactly $1 more than the amount previously received by such contractor for actual completed construction of the ditch project. Plaintiff alleged that the board ordered the county clerk to place the assessments, including that against plaintiff's land, on the tax rolls by furnishing defendant a duplicate of assessments prepared by the county surveyor and approved by the board, which provided by resolution in connection therewith that such assessments should be due and payable September 1, 1957.

Plaintiff alleged that all such proceedings on and after September 6, 1956, were wholly void for reasons theretofore alleged, and for the reasons that neither Chapter 31, article 1, R. R. S. 1943, nor any other statute contains any provision authorizing the board to either assess benefits a second time or make a reassessment after assessments have been declared void or to make an assessment or impose a lien therefor on plaintiff's real estate or upon that of anyone else after the improvement had been completed; that said statutes provide a certain order of work and procedure by the board and other county officials which was not followed in the proceedings commenced September 6, 1956, in that all of said proceedings came after the actual construction work had been done, and the contractor performed no work whatsoever on the purported contract let April 10, 1957; and that if for some reason the proceedings after September 6, 1956, were not a reassessment, then the statute gives the board no power to make an assessment after a purported assessment had been judicially declared void, and no power to determine a route, make a survey, hold a hearing on assessments on benefits and damages, advertise for bids, or let a contract on an improvement project, the work on which has been completed prior to the taking of such procedural steps.

Plaintiff alleged that unless defendant is enjoined from doing so, he will collect the assessments against her property and that of others similarly situated, and that unless said assessments are enjoined as void, they will remain a perpetual lien against said real estate and a cloud on the titles thereof, all of which would be wholly unlawful and result in irreparable injury to plaintiff, for which plaintiff has no adequate remedy at law. Accordingly, plaintiff prayed for a judgment that the second assessments were void; for a perpetual injunction; and for equitable relief.

Defendant's general demurrer to plaintiff's petition was overruled, and he answered. Therein he denied

generally and specifically denied that the assessments of which plaintiff complains were reassessments for work previously done. He then admitted as follows: That defendant was county treasurer of Dodge County, and that certain assessments for altering and straightening Rawhide Creek, including the one against plaintiff's real estate, had been certified to him, and unless prohibited by the court, he would proceed to collect the same; that theretofore, and after September 11, 1956, at request of landowners, the board commenced the Rawhide Creek project a second time and took all the required procedural steps under the provisions of Chapter 31, article 1, R. R. S. 1943, to complete the project; and that the board necessarily and in the exercise of good judgment and for the best interests of the landowners, including plaintiff, adopted and utilized work completed under a former project. Defendant alleged in that connection that even if the board were wrong in its judgment, notice having been given as required by law, and neither plaintiff nor other landowners having appealed from any determination of the board or from the assessments for substantial benefits received, they were estopped from objecting to any determination so made. Defendant alleged that plaintiff had an adequate remedy at law provided by statute but she had failed and refused to follow the provisions thereof. Defendant prayed for a denial of plaintiff's petition and recovery of costs.

The cause was tried as if plaintiff's reply were a general denial, and a judgment was thereafter rendered which found and adjudged that the proceedings of the board, purporting to act on a petition praying for certain work to be done upon Rawhide Creek, are and were void at all times on and after April 13, 1955; that all proceedings had and done in the premises on and after September 6, 1956, including the assessments and levy of special assessments for the project, were and are void and a nullity; and perpetually enjoined defendant from performing or attempting to perform any action toward

the collection or receiving of any assessments based upon any such proceedings. The judgment also declared void and of no effect the liens and clouds upon the titles to real estate involved, not only as respects plaintiff's property but also as to all property purportedly assessed for taxes or special assessments to pay for the improvement, the owners of which property elect to avail themselves of the judgment. The judgment further stated that it was: "* * * without prejudice to any further procedures there may be in connection with the levy or collection of assessments in connection with said improvement project, the court holding herein that proceedings heretofore taken and assessments heretofore levied are void." In connection with such quoted provision, we conclude that it is of no consequence here and that we are not required to discuss or determine whether or not there are further procedures by which the county board can levy or collect assessments or taxes in connection with said project. It is sufficient to say that such provision in the judgment was not in any manner prejudicial to defendant or the county board.

Thereafter, defendant's motion for new trial was overruled, and he appealed, assigning and arguing in substance: (1) That the trial court erred in enjoining the collection of assessments against plaintiff and other landowners who had not complied with section 31-124, R. R. S. 1943, and were estopped to claim that the second proceedings and resulting assessments were void; and (2) that the judgment was contrary to law. We do not sustain the assignments.

The facts are either stipulated or without dispute, and they amply sustain the allegations of plaintiff's petition. They are substantially as follows: Plaintiff was the owner of described real estate in Dodge County upon which assessments for the Rawhide Creek project were made and approved a second time. Defendant was at all times the duly qualified and acting county treasurer of Dodge County. Purporting to act under Chapter 31,

article 1, R. R. S. 1943, a petition requesting the county board to clean and straighten Rawhide Creek and its overflow channel, sometimes known as Dry Creek, was filed by several landowners with the county clerk, and on April 13, 1955, a copy thereof was delivered to the board. Thereupon, the board, purportedly acting under the provisions of Chapter 31, article 1, R. R. S. 1943, took certain preliminary steps; approved and levied assessments; let the contract for construction of the improvement; completed its construction; and paid the contractor $39,473.84, in full payment for the completed work, with money borrowed from the general fund of the county.

However, as alleged by plaintiff and heretofore mentioned, such proceedings were admittedly adjudged to be void on and after April 13, 1955, because the board: "* * * never made the determination required by Section 31-105 of the statutes that the line of the proposed improvements described in the petition * * * was or is the best route * * * which is jurisdictional." State ex rel. Union Pacific Ry. Co. v. Colfax County, 51 Neb. 28, 70 N. W. 500, and Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292, affirmed on rehearing, 72 Neb. 71, 100 N. W. 136, sustained that conclusion. In that connection, the foregoing judgment also said: "That it is not necessary to determine and this court makes no determination as to whether other defects in the proceedings alleged in the petition (of plaintiff's therein) are actually defects or have been proved." Admittedly, such judgment also perpetually enjoined collection of the assessments as void, and admittedly such judgment was not appealed from but became final and remained in full force and effect at all times on and after September 7, 1956. Admittedly, thereafter the board ordered refunds of all such void assessments as had been paid, and they were all refunded except $61.71 which remained unclaimed.

In that situation, on September 6, 1956, and there-

after, the board, accepting the aforesaid judgment as final and binding on it, admittedly began second proceedings wherein it purportedly backed up, followed the provisions of Chapter 31, article 1, R. R. S. 1943, and took the procedural paperwork steps required thereby from and after the filing and delivery of the original landowners' petition on April 13, 1955. The board again viewed the premises, and after considering letters from the county's engineer and its special counsel, the board on September 11, 1956, adopted a resolution which purported to remedy the jurisdictional defects which had made its first proceedings and assessments void. In that connection, no change was made during the second proceedings in the report, plat, profile, survey, specifications, and cost estimates made by the county surveyor for the construction work which had been theretofore entirely completed. In that situation also, an assessment for benefits was filed by the county surveyor after which the county clerk set a date for hearing thereon and served notice thereof on landowners whose lands were so purportedly assessed. Thereafter, the county board purportedly approved such new assessments and directed the county clerk to advertise for sealed bids for construction of the ditch, which in fact had already been constructed. Pursuant to such advertisement, a purported letting was held April 10, 1957, whereat the board let the contract a second time to the original contractor, who was sole bidder on a bid of $39,474.84, exactly $1 more than the amount previously received by him for his former completed actual construction of the project. In that connection, the advertisement for bids provided in part: "The contract is to be awarded to the lowest responsibile bidder * * *" but "The successful bidder shall give suitable credit for any work heretofore done on said project." In other words, by bidding just $1 more for being required to do exactly nothing under the second contract, the original contractor and bidder purportedly complied with the

advertisement for bids, and on September 7, 1957, he was paid $1 upon a claim theretofore filed by him.

In connection with the entire second proceedings, the chairman of the board testified that after the court had declared the first proceedings and assessments void, the board concluded that it had to do something. Thereupon, its then counsel advised the board that it could proceed to back up, refile a petition, and take all the procedural steps again such as were required by the paperwork, so it then backed up and did all the paperwork over again. Thus, the board went out and looked at the project and inspected the route of the creek even though it had already been changed by previous construction of the ditch, and the board made no change in the route of the ditch that had already been completed. He testified that the guiding principle of the board in all its proceedings after September 6, 1956, was that the paperwork record of the second proceedings should be as exactly in accordance with the statutes as the board could make it. He admitted that on and after September 6, 1956, the board did not make any new determinations or decisions, but that it simply ratified what it had already decided and done.

On the other hand, the county clerk testified that the plans and specifications for both the first and second proceedings were identical, and that by August 25, 1956, " 'everything was done and the Board accepted the project and has paid the contractor in full' * * * all of his money under that contract for the first project * * *." He also verified that as directed by the board in the second proceedings, he advertised for sealed bids for construction of the ditch already completely constructed, and that on April 10, 1957, a contract therefor was let as heretofore set forth.

The county surveyor testified that he drew the plans and specifications for the ditch in both proceedings, and supervised complete construction of the ditch prior to September 6, 1956; that he thereafter inspected the

ditch about September 10, 1956; that he submitted separate cost estimates to the county board for both the first and second proceedings; and that the estimated cost for listed items of work and excavation of the ditch in each estimate was the same except for the cost of hauling some dirt included in the second estimate. However, such dirt hauling was not required to be done by the contractor under the second contract.

The county treasurer testified that $49,000 was transferred from the county general fund to the Rawhide Ditch fund prior to paying the contractor for construction of the ditch in August 1956; that after September 11, 1956, by refunding the first void assessments, there were no other funds to the credit of the project with which to pay for right-of-way and damages; that the total of the second assessments was about $65,000, which was sufficient to complete the project in its entirety, including prior construction of the ditch and payment for right-of-way and damages; that $33,762.79 has been paid on the second assessment; and that $21,722.29 remained in the project fund.

Defendant first argued that his demurrer should have been sustained and that the trial court erred in enjoining collection of the second assessments as sought by plaintiff because she had not complied with section 31-124, R. R. S. 1943, by first paying the amount of her assessments, and that she was estopped to claim that the second proceedings were void. We do not agree.

In that respect, as early as Morris v. Merrell, 44 Neb. 423, 62 N. W. 865, this court, in dealing with that section, held that: "A party who is not guilty of laches may invoke the aid of a court of equity to restrain the collection of a void tax or assessment."

Thereafter, in Cullingham v. City of Omaha, 143 Neb. 744, 10 N. W. 2d 615, this court quoted the foregoing rule, but, relying upon City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396, we modified such rule by concluding that when special assessments against

property to pay costs are void, knowledge of the proceedings and of construction of the improvement will not estop the owner from avoiding liability therefor, and that such a void tax or assessment cannot be enforced solely on the ground of benefits of the improvement to the owners of abutting lands. In that connection, this court said: "It will be noted that by the earlier rule laches might be a defense to an action in equity to restrain the collection of a void tax or assessment whereas by the later rule it may not.

"We think the later statement of the rule is the correct one. Delay of effort to protect against a void tax or assessment cannot have the effect of making vital and valid that which had no vitality or validity from the beginning."

Therein, also, this court went on to say: "Clearly the statute contemplated that contracts for public improvements should be entire in character, that is that full responsibility for the performance of the contract for the contract price should rest upon the contractor. It does not contemplate a discretion to modify or depart therefrom by the municipality and consequent payment on the basis of modification or departure in violation of the terms of the contract and statute.

"The power of a municipality to contract for public improvements and to levy special assessments to defray the expense is statutory and such powers must be strictly construed.

"In Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218, this court said: 'It is familiar law that in order to sustain an assessment of this character the record must show affirmatively a compliance with all the conditions essential to the valid exercise of the taxing power.'

"In Futscher v. City of Rulo, 107 Neb. 521, 186 N. W. 536, it was stated: 'The power delegated to a city to construct local improvements and levy special assessments for the payment thereof is to be strictly construed

against the city, and every reasonable doubt as to the extent or limitation of such power is resolved against the city.' The same holding was made in slightly different wording in Baker v. Dahlman, 119 Neb. 425, 229 N. W. 280. Of like effect are Garver v. City of Humboldt, 120 Neb. 132, 231 N. W. 699, and Musser v. Village of Rushville, 122 Neb. 128, 239 N. W. 642.

"A compelling reason for this rule is well stated in Wright v. Hoctor, 95 Neb. 342, 145 N. W. 704, by quotation from Malette v. City of Spokane, 68 Wash. 578, 123 Pac. 1005, as follows: 'Under such a system there would be no limit to the "discretion" of the city officers, who to serve personal or political ends might burden the taxpayer beyond the point of endurance.'" Such opinion was cited with approval in Besack v. City of Beatrice, 154 Neb. 142, 47 N. W. 2d 356. See, also, Annotation, 108 A. L. R. 204, citing numerous authorities from this jurisdiction. By analogy, of course, the same rules apply in cases such as that at bar.

We are required then to determine whether the assessments here involved were void within the meaning of the law. We conclude that they were void.

In Thompson v. Colfax County, 106 Neb. 351, 183 N. W. 571, this court concluded that in such proceedings the board of county commissioners acts as agent or trustee of the persons whose property is chargeable with the cost of the work, and not for the county. In that connection, also, as early as Morton v. Carlin, 51 Neb. 202, 70 N. W. 966, this court held: "Counties and county boards can exercise only such powers as are expressly conferred upon them by statute, and such grant of powers must be strictly construed. (State v. Lincoln County, 18 Neb. 283.)"

In State ex rel. Johnson v. County of Gage, 154 Neb. 822, 49 N. W. 2d 672, we held that: "A county in this state has only such powers as are expressly conferred upon it by statutes and such as are incidentally indispensable to carry into effect those expressly granted it.

"A grant of power to a county is strictly construed and any reasonable doubt of the existence of the power is resolved against the county." Such opinion was cited with approval as recently as Board of Commissioners v. McNally, 168 Neb. 23, 95 N. W. 2d 153.

As early as Hurford v. City of Omaha, 4 Neb. 336, citing authorities, this court said: "That when the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory.

"When a fair interpretation of the statute, which directs acts or proceedings to be done in a certain way, shows that the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and pre-requisite conditions must exist prior to the exercise of power, or must be performed before certain other powers can be exercised, then the statute must be regarded as mandatory. And under such statutory provisions, the corporation has no election in the matter as to how or when the duties shall be performed, and municipal officers have no option or authority to act differently from the mode particularly prescribed. And if there be manifest irregularity in the proceedings, presumptions are not indulged to sustain such proceedings, or to give new character to that which is seen to be defective, or to supply the place of that which is not apparent.

"When the statutory provision relates to acts or proceedings immaterial in themselves, but contains negative terms, either expressed or implied, then such negative terms clearly show a legislative intent to impose a limitation, and therefore the statute becomes imperative, and requires strict performance in the mode or manner prescribed."

That opinion was cited and quoted from with approval by this court in Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, 163 Neb. 687, 81 N. W. 2d 159, wherein we said: "'* * * when the statute prescribes a particular mode in which the corporation is to act, it can only act in the mode prescribed. To sanction a contrary doctrine * * * would place the corporation above the law, and would, to say the least, be fraught with dangerous consequences.'"

In Clay County v. Bottorf, 166 Neb. 262, 88 N. W. 2d 898, we held that: "A grant of authority to a county is strictly construed and enjoyment of the grant requires a compliance with any condition or restriction of the grant."

In Besack v. City of Beatrice, *supra,* we held that: "The power and authority to make public improvements does not of itself confer power and authority to levy and collect special taxes or assessments to defray the cost of such improvements.

"The legislative power and authority delegated to a city to construct local improvements and levy assessments for payment thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer." See, also, Chicago & N. W. Ry. Co. v. City of Seward, 166 Neb. 123, 88 N. W. 2d 175; Danielson v. City of Bellevue, 167 Neb. 809, 95 N. W. 2d 57; Chicago & N. W. Ry. Co. v. City of Omaha, 156 Neb. 705, 57 N. W. 2d 753.

Also, as held in Haecke v. Eastern Sarpy County Drainage Dist., 141 Neb. 628, 4 N. W. 2d 744: "'Statutory provisions authorizing assessments of special taxes against property benefited by public improvements are to be strictly construed, and it must affirmatively appear that the taxing authorities have taken all steps which the law makes jurisdictional; the failure of the record to show such proceedings will not be aided by

presumptions.' Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734."

Without quoting therefrom or particularly setting forth its provisions at length, it is sufficient for us to point out that the respective sections appearing in Chapter 31, article 1, R. R. S. 1943, provide the procedural steps and the order of time in which they must be taken to authorize and approve a project such as that here involved; ascertain and determine the cost of location and construction; make and approve the apportionments and assessments; advertise for bids and let the contract for construction to the lowest responsible bidder; supervise and complete the construction; and pay the contractor therefor, as well as pay for right-of-way and damages.

In the case at bar, a petition for the improvement was filed with the county clerk, who delivered a copy of same to the board April 13, 1955. Thereafter, the first contract was let, the ditch was entirely and completely constructed, and the contractor was paid in full therefor prior to August 27, 1956, whereupon the entire proceedings, including the assessments theretofore made and approved by the board, were held to be void and a nullity. It was thereafter, on September 6, 1956, that the county board attempted to back up, complete the course of paperwork procedure provided by Chapter 31, article 1, R. R. S. 1943, and thereby ratify its former procedure by revising and amending same to supply its jurisdictional defects and give validity to what the board had already done, which had no vitality or validity from its beginning. In other words, every step required by statute except the filing of the landowner's petition and bond, was taken by the board after the project had been entirely completed and without any new determination or decision except that the line of the project was the best route, which the chairman of the board testified had actually been determined in the first proceedings but had not been made in writing

or placed of record in its journal. Now, after the project had been completed during the first proceedings, which were admittedly void, the defendant argues that it was sufficient for the board to simply proceed with the required paperwork and thereby implement its power to make new valid assessments. We do not agree.

A comparable contention was made in Chicago, St. P., M. & O. Ry. Co. v. City of Randolph, *supra,* wherein this court said: "This argument is tantamount to saying that the city could proceed to make improvements without compliance with the jurisdictional requirements of the statute as to the creation of a valid district, and after the improvements were completed it will be sufficient then to enact an ordinance to implement its power. In short, that it can do at the end of the proceedings that which the statute makes the first jurisdictional requirement to create the power to improve and assess.

"Paraphrasing language used in Gutta Percha & Rubber Mfg. Co. v. Village of Ogallala, 40 Neb. 775, 59 N. W. 513, 42 Am. S. R. 696, approved in City of Plattsmouth v. Murphy, 74 Neb. 749, 105 N. W. 293, if ratification is sanctioned upon a proceeding of this kind, legislative restriction upon municipal corporation powers is in vain."

Further, in State ex rel. Union Pacific Ry. Co. v. Colfax County, *supra,* this court said: "County boards possess limited jurisdiction, and the grant of power conferred upon them is to be strictly construed. * * * They have no authority to construct a ditch under the drainage law, unless all the jurisdictional steps have been taken."

We conclude that the applicable statutes prescribe the jurisdictional procedure and the mode whereby the board exercises its power to make drainage improvements, and that such procedure and mode must be strictly followed or the assessments will be void. Under Chapter 31, article 1, R. R. S. 1943, a county board can-

not physically locate and complete construction of a drainage improvement, pay the contractor in full therefor, then take the statutory steps required by sections 31-105 to 31-111, and section 31-118, R. R. S. 1943, and thereby validly assess the cost of the improvement to abutting landowners. To hold otherwise would clearly be a violation of the statute, which cannot be justified by a need for the improvement.

There is another reason why the assessments were void. They were in effect a reassessment, and we do not have presented herein a case where the Legislature has attempted to authorize a reassessment, or a second procedure, or otherwise to permit the making of another assessment after one has been declared void. Defendant in his brief concedes "that a governing body having constructed and completed an improvement and the assessment for the same been held invalid, could not breathe new life into the old assessment by some paper work in the way of new certification."

As stated in 48 Am. Jur., Special or Local Assessments, § 147, p. 688, citing authorities: "A reassessment implies not merely the fact of the improvement, but also that one attempt has been made to collect the cost and failed, and it is in a sense a continuation of the original proceedings."

Since the board in its second paperwork based its proceedings on the original petition of landowners filed and delivered to the board on April 13, 1955, we believe that it was simply a continuation of the original void proceedings. In that connection, Chapter 31, article 1, R. R. S. 1943, does not authorize a county board to make a reassessment after an assessment has been declared void by a court of competent jurisdiction whose decision was not appealed and was admittedly in full force and effect. There are numerous other provisions in the statutes whereby governing bodies such as first-class cities, primary cities, metropolitan cities, and drainage districts, of which this is not one, are given authority in

one form or another, to reassess where the first assessments have been declared void. See, §§ 14-538, 15-719, 15-725, 15-822, 16-708, and Chapter 31, articles 3, 4, and 5, R. R. S. 1943. On the other hand, second-class cities and villages, drainage projects initiated by individual landowners, counties, and county boards are given no such general powers in any statute cited or found. In that connection, defendant argued that the board simply utilized the previous work in developing a new plan. However, the undisputed facts heretofore set forth entirely refute that contention.

We have been cited no authority and we have found none which could give defendant any relief in this proceeding. For reasons heretofore stated, we conclude that the judgment of the trial court should be and it is hereby affirmed. All costs are taxed to defendant.

AFFIRMED.

STATE OF NEBRASKA EX REL. ARTHUR BOTTOLFSON, APPELLANT, V. SCHOOL BOARD OF SCHOOL DISTRICT NO. R 1 OF CEDAR AND DIXON COUNTIES, NEBRASKA, ET AL., APPELLEES.

103 N. W. 2d 146

Filed May 6, 1960. No. 34761.

1. Statutes. By Article III, section 14, Constitution of Nebraska, it is provided that no bill shall contain more than one subject which subject shall be clearly expressed in the title.
2. ———. The title to an act of the Legislature must be such as to give reasonable notice to the members of the Legislature, and others interested, of the general subject upon which it is proposed to legislate.
3. ———. The test of the validity of amendments is whether or not their provisions are germane to the provisions of the statute sought to be amended.
4. ———. The purpose of the constitutional provision limiting a legislative enactment to the object expressed in the title is to challenge the attention of those affected by the provisions of the act and to prevent surreptitious legislation.

5. ———. The title of an act amending a former act of the Legislature may be looked to, as well as that of the original act, to ascertain if the amending act has any matter different from what is expressed in the title.
6. ———. Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended or supplemented.

APPEAL from the district court for Cedar County: JOHN E. NEWTON, JUDGE. *Affirmed.*

Addison & Addison, for appellant.

Gordon C. Gobel, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an appeal in an action in the district court for Cedar County, Nebraska, wherein in the name of the State of Nebraska on relation of Arthur Bottolfson, relator, an affidavit and petition were filed, the purpose of which was to secure a peremptory writ of mandamus against the School Board of School District No. R 1, a Class II school district of Cedar and Dixon Counties, Nebraska, and the individual members of the board, respondents, requiring the board to sign a petition to transfer the southwest quarter of Section 16, Township 31 North, Range 3 East of the 6th P. M., in Cedar County, Nebraska, which land is owned by the relator and is in School District No. R 1, to School District No. 32, which is a Class I school district. The request was made pursuant to the following which is a part of section 79-402, R. S. Supp., 1957: "* * * and provided further, that school boards or boards of education shall sign such petitions when requested to do so by persons desiring to transfer their land from a Class II or III district to a Class I district or another Class II or III district when such persons have personally paid tuition

for their children to attend school in the other district over a period of two or more years or reside nearer the schoolhouse in the other district than the schoolhouse in their own district." This was an amendment to section 79-402, R. S. Supp., 1955, which originally was a section of a bill enacted into law by the 1949 session of the Legislature. This was Legislative Bill 1, Laws 1949, c. 256, p. 689.

To the affidavit and petition the respondents filed an answer and an amendment thereto. By the answer the material allegations of fact are not denied. In fact by stipulation in the bill of exceptions their truth is admitted.

By the answer and the amendment thereto the respondents challenge the constitutionality of the statutory provision which is the basis of the claimed right of the relator to the peremptory writ of mandamus. It is charged specifically that the statutory provision is violative of Article XIV, section 1, Constitution of the United States, and of Article I, section 3, Constitution of Nebraska, and generally that it is "contrary to the fundamental law of the Constitution and void."

The case was tried to the court and the writ was denied. It was denied on the ground that the statutory provision is unconstitutional and void.

The relator has appealed from this judgment. He will be hereinafter referred to as the appellant. The respondents will be referred to as appellees.

By the assignments of error which require consideration here the appellant asserts generally (1) that the court erred in holding that the provision of section 79-402, R. S. Supp., 1957, is unconstitutional; (2) that the court erred in holding that the provision which is purportedly an amendment to section 79-402, R. S. Supp., 1955, is in fact an amendment to section 79-403, R. S. Supp., 1955, and accordingly unconstitutional; (3) that the court erred in holding that the provision is arbitrary and creates an unlawful classification and distinc-

tion between persons and property, and therefore unconstitutional; and (4) that the court erred in holding that the provision is unconstitutional for the reason that no provision is made for notice and hearing as a prerequisite to a transfer of land at the request of a resident.

In order to determine the questions presented it becomes necessary to trace the history of section 79-402, R. S. Supp., 1957, from the date of its original enactment in 1949 to at least the date of the commencement of this action in the district court. As pointed out the original section was enacted into law as a section of Legislative Bill 1, Laws 1949, c. 256, p. 689. By its title it was designated an act to revise, adopt, and establish a code of laws for the State of Nebraska relating to schools and to repeal Chapter 79, R. S. 1943, all amendments contained in R. S. Supp., 1947, and a group of bills and a part of another of the Sixty-first session of the Legislature. This bill consisted of 515 sections and covered 177 pages in the session laws of that session of the Legislature. This section in its entirety as originally enacted is as follows: "The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by fifty-five per cent of the legal voters of each district affected. Such officer shall have the discretionary power to annex any territory, not organized into districts, to any existing district; Provided, changes affecting cities or villages shall be made upon the petition of the board of education of the district or districts affected."

It is observable that the subjects or powers declared by the section are creation of new districts from other districts or change of the boundaries of any district on petition of 55 percent of the legal voters of each district affected, except that where the changes affect cities or villages the petition shall be by the board of education, and discretionary power of the county superintend-

ent to annex any territory not organized into districts to any existing district.

This section was amended by section 2 of Legislative Bill 92 by the Legislature at its session in 1951. Laws 1951, c. 276, § 2, p. 928. There was no substantial departure from the powers and duties prescribed by the original section. The following powers and duties however were added: The county superintendent was required to give notice of and to conduct hearings, and it was provided that a newly enlarged district should assume any indebtedness previously incurred by any one or more districts annexed, unless otherwise specified in the petitions.

It is pointed out that neither the title to this amendatory act nor the section as amended in 1951 contained any direct or inferential reference to the subject contained in the provision under attack in this action.

By Legislative Bill 279, Laws 1953, c. 295, § 1, p. 999, the Legislature amended section 79-402, R. S. Supp., 1951. The only material change made was a requirement that any plan for reorganization of a school district must be submitted to the state committee for school district reorganization and be approved before hearing by the county superintendent.

This bill contained two new sections, or sections which were not amendatory of section 79-402, R. S. Supp., 1951. These sections have no reference to the substance of section 79-402, R. S. Supp., 1951, but only to petitions and proceedings in case of an attempt to reorganize by a group of districts.

As was true with relation to the 1951 amendment there is no reference in the title nor the act itself to the subject contained in the provision under attack.

By Legislative Bill 305, Laws 1955, c. 315, § 3, p. 973, the Legislature amended section 79-402, R. S. Supp., 1953. The only material change, if it may be regarded as material, was the addition of Class III school districts in the first sentence of the proviso, so that the proviso

pertained to Class III school districts as well as to cities and villages. As disclosed by the bill, the amendment is separately referable to section 79-402, R. S. Supp., 1953, although the bill contains 10 sections. An examination of the title and the body of the section as amended discloses that the subject and purpose of the provision under examination here was not introduced.

As has already become evident section 79-402, R. S. Supp., 1955, was amended in 1957. This was done by Legislative Bill 582, Laws 1957, c. 342, § 1, p. 1181. The title to that bill is the following: "AN ACT to amend sections 79-402, 79-426.09, and 79-426.15, Revised Statutes Supplement, 1955, relating to schools; to change the procedure for reorganization of school districts and making other changes as prescribed; to provide for meetings of special committee as prescribed; and to repeal the original sections and also sections 79-426.20 and 79-426.21, Revised Statutes Supplement, 1955."

Examination of this title discloses no reference to any right or procedure of a person or persons to have land transferred from one school district to another for any reason, and particularly on the basis of school attendance and distance from school attended. Likewise there is no reference to a mandatory right of an owner of land to have a school board or board of education sign a petition for a transfer of land from one district to another on request of individual landowners.

This history discloses that nothing is to be found in the original text of section 79-402, R. S. Supp., 1949, in the amendments thereto, or the titles to the amendatory acts which will permit it to be said that attention was directed to this amendatory provision. It was a subject matter foreign thereto, and in nowise germane.

Article III, section 14, Constitution of Nebraska, contains the following: "* * * No bill shall contain more than one subject, and the same shall be clearly expressed in the title. * * *"

This provision requires, as is stated in Appel Mercan-

tile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133, that: "The title of an act of the legislature must be such as to give reasonable notice to the members of the legislature, and others interested, of the general subject upon which it is proposed to legislate." See, also, West Point Water Power & Land Improvement Co. v. State ex rel. Moodie, on rehearing, 49 Neb. 223, 68 N. W. 507; State v. Burlington & M. R. R. R. Co., 60 Neb. 741, 84 N. W. 254.

In Wayne County v. Steele, 121 Neb. 438, 237 N. W. 288, it was said: "The test of the validity of amendments is whether their provisions are 'germane' to the provisions of the statute sought to be amended."

The basic purpose of the constitutional provision quoted herein is set forth in Omaha Parking Authority v. City of Omaha, 163 Neb. 97, 77 N. W. 2d 862, as follows: "The purpose of this provision limiting a legislative enactment to the object expressed in the title is to challenge the attention of those affected by the provisions of the act and to prevent surreptitious legislation."

As a guide to a determination of whether or not Article III, section 14, Constitution of Nebraska, is violated in an instance where the sufficiency of the title to an amendatory act is brought into question, this court in Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N. W. 855, quoted with approval the following from Jones v. Mayor and Council of Columbus, 25 Ga. 610: " 'The title of an act amending a former act of the legislature may be looked to, as well as that of the original act, to ascertain if the amending act has any matter different from what is expressed in the title.' "

As a further guide the following was quoted in the same opinion from 59 C. J., Statutes, § 400, p. 819: " 'Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provi-

sions of the act are covered by the title of the act amended or supplemented.' "

On application of these statements of legal principle under Article III, section 14, Constitution of Nebraska, to the provision of section 79-402, R. S. Supp., 1957, which is under attack, and the history of the section as outlined herein it becomes apparent that this subject matter never appeared and it was not expressed in the original section or in the title to the original section or in the title to any amendatory act. Accordingly the provision is unconstitutional to the extent that the district court found by its judgment.

This conclusion disposes of the primary question of constitutionality presented to the district court and to this court on appeal favorably to the appellees. It appears however that some explanatory observations with reference to remaining assignments of error are proper and in order. Attention is therefore directed to an assignment that the court erred in holding that the provision in question was an amendment to section 79-403, R. S. Supp., 1955, and not to section 79-402, R. S. Supp., 1955.

This may be disposed of by the statement that the court's finding that this provision was an amendment to section 79-403, R. S. Supp., 1955, was erroneous, but it cannot be said to impair the ultimate judgment of the court. It is rejected as having no significance in the determination of the case. The amendment was to section 79-402, R. S. Supp., 1955, and there can be no doubt about that. No opinion is expressed as to constitutionality if it had been enacted as an amendment to section 79-403, R. S. Supp., 1955.

This provision read separately, or together with the entire section, either before or after the amendment, did not deal with a right of the appellant to have his property transferred but only with a right on his part to have the school board of his district sign a petition for transfer. Obviously if the amendment was constitu-

tional there could be no transfer without going through the processes designated in section 79-402, R. S. Supp., 1957. Under these 40 days is allowed within which to submit proposals to the state committee. The state committee is allowed 40 days to review the proposals. The county committee is allowed 15 days thereafter to give notice and hold a public hearing. The county committee is then required to hold the petitions for 10 days and then file them with the county superintendent. The county superintendent is then required to advertise and hold a hearing for determination of the validity of the petitions.

The transcript herein discloses that on August 4, 1959, the appellant requested the president of school district No. R 1 to sign a petition for transfer of land. It appears that the affidavit and petition herein were filed August 6, 1959. On November 10, 1959, the judgment which is the basis of this appeal was rendered.

The Legislature of 1959 again amended the section which amendment became effective September 28, 1959. Legislative Bill 244, Laws 1959, c. 385, p. 1333. The right of a property owner to have a petition signed for transfer of his property to a Class I district was taken away by this amendment.

The question of whether or not the issue presented to the district court became and is moot because of this we do not decide, since it is not presented by the briefs. It may not however be well contended, in the light of procedures analyzed, that even if the provision which furnishes the basis for this action were held constitutional that the reversal of the judgment of the district court would or could effect the transfer which the appellant seeks. The lapse of time statutorily provided for necessary procedures would prevent it.

The judgment of the district court is affirmed.

AFFIRMED.

EARL S. TEXTER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

102 N. W. 2d 655

Filed May 6, 1960. No. 34775.

1. **Witnesses: Evidence.** A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue. Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record. Such declarations are received to aid the court or the jury in estimating the character and credibility of the witness.
2. **Criminal Law.** Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law.
3. ———. It is the duty of the prosecution to produce all evidence tending to establish the guilt or innocence of an accused. However, it is not necessary for the State to call every witness whom it knows may have some knowledge relating to the crime charged if such knowledge is not material to the question of the accused's guilt or innocence.
4. **Rape.** In cases of rape, where the accused testifies as a witness on his own behalf and denies the charge, the testimony of the prosecutrix alone is not sufficient to support a conviction. It must be corroborated by other evidence on material points.
5. ———. It is not essential that the prosecutrix be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn.
6. ———. In a prosecution for rape the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to that fact and the nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and the nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix as to the main fact in issue.
7. **Criminal Law.** This court, in a criminal action, will not interfere with a verdict of guilty based upon conflicting evidence

unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt.

ERROR to the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

John McArthur, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Homer L. Hamilton,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Earl S. Texter was convicted by a jury in the district court for Lancaster County of the crime of statutory rape. He thereupon filed a motion in that court asking it to vacate and set aside the jury's verdict, for reasons therein set forth, and to grant him a new trial. This motion the trial court overruled, after which it sentenced defendant to serve 10 years in the Nebraska State Penitentiary. This error proceeding was taken by the defendant to this court for the purpose of having us review the record of his conviction in relation to certain errors which he claims occurred in the court below and which errors he claims prevented him from having a fair and impartial trial. For convenience we shall herein refer to the plaintiff in error as either defendant or Tex.

The first contention made by the defendant is that the trial court erred by receiving in evidence, over his objections, hearsay evidence that he committed the crime with which he had been charged. The evidence referred to was given by detective Lowell Sellmeyer of the Lincoln police force and relates to what he was told by Olga H. Verry, mother of the prosecutrix, shortly after the crime occurred of which defendant was convicted. If this evidence had been offered by the State and received as substantive proof of the crime charged

it would fall within the cases cited by the plaintiff in error and be controlled thereby. See, Langdon v. Loup River Public Power Dist., 142 Neb. 859, 8 N. W. 2d 201; Triplett v. Western Public Service Co., 129 Neb. 799, 263 N. W. 229; Village of Ponca v. Crawford, 18 Neb. 551, 26 N. W. 365; Clopper v. Poland, 12 Neb. 69, 10 N. W. 538. But such is not the case. Olga H. Verry was called by the State and testified in detail as to just what happened on the night of July 22, 1959, when the crime with which the defendant was charged occurred. On cross-examination she changed her testimony in at least two material aspects. Thereafter, on redirect examination by the State, she maintained the testimony she had given on cross-examination was correct. The State then asked the proper questions for impeaching her on these material changes. Subsequently police officer Sellmeyer was put on the stand by the State and he testified to what this witness had told him the night of July 22-23, 1959, in regard to these matters and the trial court properly limited the jury's consideration of his testimony in regard thereto by its instruction No. 11. We held in Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial." And, as stated in Mason v. Reynolds, 135 Neb. 773, 284 N. W. 257: "To this holding we may add the reasons therefor: Counsel should be allowed to show such previous inconsistent statements of his own witness, for the reason of refreshing his memory, probing his conscience, and, if for no other reason, that

he may show the court and jury the circumstance which induced him to call and vouch for such a witness." See, also, Cornell v. State, 139 Neb. 878, 299 N. W. 231; Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649. As stated in Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588: "Evidence tending to show that a person made, before becoming a witness in a case, statements inconsistent with and contrary to his testimony as a witness on the trial thereof, does not dispose of his testimony as to the matters involved. It constitutes a part of the evidence in the case to be weighed and considered in the determination thereof. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. This is clearly stated in Zimmerman v. Kearney County Bank, 59 Neb. 23, 80 N. W. 54: 'A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue. * * * Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record. * * * Such declarations are received to aid the court or the jury in estimating the character and credibility of the witness.'" And the foregoing would have equal application when a witness called changes her testimony as to material matters on cross-examination.

By its instruction No. 11 the trial court instructed the jury as follows in this regard: "The State was permitted to lay the foundation for the impeachment of Mrs. Olga Verry to show that this witness answered various questions to a police officer inconsistent with and contrary to her testimony as a witness on the trial hereof. Proof of contradictory statements of a witness, if such you find, is received not as evidence of the facts declared in such alleged contradictory statement

or statements, but for the purpose only of aiding the jury in estimating the credibility of the witness." This instruction properly limited the purpose of this evidence. See, Cornell v. State, *supra;* Schluter v. State, *supra.* We find no merit in this contention.

Defendant complains of the fact that he was, on cross-examination, required to answer the following question although he made objection to doing so: "Q-Did you know that Delores (Gaub) told the police that you did have intercourse there in the bedroom at that time?" The "time" related to the night of July 22-23, 1959. We have always adhered to the principle that: "Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law." Elliott v. State, 34 Neb. 48, 51 N. W. 315. See, also, Leo v. State, 63 Neb. 723, 89 N. W. 303; Dunlap v. State, 116 Neb. 313, 217 N. W. 89; Wehenkel v. State, 116 Neb. 493, 218 N. W. 137; Crawford v. State, 116 Neb. 629, 218 N. W. 421.

As stated in Kleinschmidt v. State, 116 Neb. 577, 218 N. W. 384: "Unless it can be said, with reasonable certainty, that irrelevant and incompetent evidence received upon the trial of a criminal case is not so prejudicial as to deprive the defendant of a fair trial, a conviction secured by such evidence will be set aside."

Delores Gaub did not so testify nor did the State produce any police officer who testified to that effect. In view thereof we will assume, for the purpose of discussion only, that it was error to require the defendant to answer the question, which he did in the negative.

However, as stated in Jurgensen v. State, 135 Neb. 537, 283 N. W. 228: "Error may creep into the proceedings in criminal prosecutions in spite of impartiality, care, learning and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the re-

versal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting absolute perfection in bringing malefactors to justice." See, also, § 29-2308, R. R. S. 1943. Evidence, which was received without objection, shows that defendant, who at all times herein material was a married man, spent many nights in the apartment occupied by Delores Gaub, whom he was dating, and her mother Olga H. Verry; that the apartment consisted of a bedroom, living room, dining room, kitchen, and bath; that he had spent one night in a bedroom with Delores Gaub in the apartment of the latter's brother Gordon Gaub, although not with the brother's knowledge or consent; that on many occasions defendant and Delores came out of her bedroom together; that on the night in question they were in her bedroom together; and that on August 22, 1959, the police caught defendant and Delores together in bed in a hotel in Lincoln, for which charges were filed against them which are still pending. Under this situation we do not think that having to answer this question could have been prejudicial to the defendant.

Defendant contends it was prejudicial error for the State to permanently remove Dennis Gaub from the state and to fail to produce Dennis and policewoman Hulda Roper of the Lincoln police force as witnesses. Dennis Gaub was a 10-year-old brother of the prosecutrix. Their parents had been divorced in 1956. Thereafter, in October 1957, the father Christoph J. Gaub, who then lived in Sidney, Montana, was given the custody of the parents' three youngest children, which included Dennis and the prosecutrix, the latter being 7 years of age on July 22, 1959. On July 11, 1959, the daughter Delores and her mother went to Sidney, Montana, in Delores' car to get the three youngest children. They returned with the children on July 13, 1959, with the intention of having the children visit with them and

the children's brother Gordon until school started in September. However, after the incident of July 22, 1959, Gordon Gaub, under the auspices of the Red Cross, returned the children to the custody of their father at Sidney, Montana. This he did on July 26, 1959. Thus it becomes evident the State did not remove any of these children, which would include Dennis.

It is the duty of the prosecution to produce all evidence tending to establish the guilt or innocence of the accused. Fugate v. State, 169 Neb. 434, 99 N. W. 2d 874. And there may be situations where a failure to do so can result in error requiring reversal. See, Klawitter v. State, 76 Neb. 49, 107 N. W. 121; Peery v. State, 163 Neb. 628, 80 N. W. 2d 699. However, it is not necessary for the State to call every witness whom it knows may have some knowledge relating to the crime charged if such knowledge is not material to the question of the accused's guilt or innocence.

On the night of July 22, 1959, Dennis and his sister, the prosecutrix, stayed at the apartment of their mother and sister located at 219 South Fifteenth Street in the city of Lincoln. The mother put the children to bed in the living room, Dennis sleeping on a rollaway bed and prosecutrix on a couch, which is also referred to in the record as a sofa or daveno. The rollaway bed and couch were about 2 or 3 feet apart. The record shows that at all times herein material Dennis was asleep. Under these circumstances we do not see why the State should have been required to call him nor do we think it was obligated to do so. As to policewoman Hulda Roper, the evidence shows she talked to the mother, Delores, Dennis, and the prosecutrix the morning of July 23, 1959. What these people told her would not be admissible except possibly the complaints of the prosecutrix as to her being molested, if she made any such complaint to her. But the latter would only be corroborative of what other witnesses have testified to. Therefore, we do not think it was necessary for the State

to call her. We find defendant's contention in this regard to be without merit.

Finally, the defendant contends the evidence adduced is not sufficient to sustain the verdict because the corroboration is inadequate. As a witness defendant unequivocally denied the commission of the crime with which he was charged. We said in Klawitter v. State, *supra,* that: "The rule is settled in this state that in cases of rape unless the testimony of the prosecutrix is corroborated on material points, where the accused testifies as a witness on his own behalf and denies the charge, her testimony alone is not sufficient to warrant a conviction." However, we therein went on to say: "But this rule is qualified by the other principle that it is not essential that she be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." See, also, Haynes v. State, 137 Neb. 69, 288 N. W. 382; Cascio v. State, 147 Neb. 1075, 25 N. W. 2d 897; Prokop v. State, 148 Neb. 582, 28 N. W. 2d 200, 172 A. L. R. 916; Sherrick v. State, 157 Neb. 623, 61 N. W. 2d 358; Peery v. State, *supra.* In Krug v. State, 116 Neb. 185, 216 N. W. 664, it was said: "In prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix as to the main fact in issue."

There are discrepancies, inconsistencies, and conflicts in the evidence adduced but these are matters which it

was the duty of the jurors to consider and weigh in arriving at their verdict for the credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case. Sedlacek v. State, 166 Neb. 736, 90 N. W. 2d 340; Small v. State, 165 Neb. 381, 85 N. W. 2d 712. As stated in Small v. State, *supra*: "This court in a criminal action will not interfere with the verdict of guilty based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." See, also, Sherrick v. State, *supra*.

The crime of which defendant was found guilty occurred on Wednesday, July 22, 1959. In order to get a better picture of the situation out of which the charges made against defendant arose a background of his relation to the Gaub family is necessary. The Gaub family was originally from Sidney, Montana. It consisted of the mother, now Olga H. Verry; the father, Christoph J. Gaub; a daughter, Delores; a son, Gordon; a daughter, Dianne; a son, Dennis; and a daughter, Donna Lou, the prosecutrix. On July 22, 1959, these children were respectively 20, 19, 13, 10, and 7 years of age. The Gaubs were divorced in 1956 in what is referred to as a bitterly contested action. Thereafter, in October 1957, the father was awarded the custody of Dianne, Dennis, and Donna Lou. Delores came to Lincoln in May 1958. She was then and still is single. She became acquainted with defendant and, in either February or March 1959, they started going together. The close intimacy of that relationship has already been referred to. Gordon, who was married, also came to Lincoln to live, being assigned to duty at the Lincoln Air Force Base. In March 1959, the mother came to Lincoln. At first she and Delores lived with Gordon and his family in the latter's apartment. Apparently after the incident that occurred there in which defendant and Delores were involved, hereinbefore referred to, the mother and Delores moved out of Gordon's

apartment and into the one they occupied at 219 South Fifteenth Street on July 22, 1959. On July 11, 1959, Delores and her mother, in the former's car, drove to Sidney, Montana, to get Dianne, Dennis, and Donna Lou, arrangements having been made for them to visit in Lincoln until school opened in September. They arrived in Lincoln on July 13, and thereafter the three children stayed with either Gordon and his family in their apartment or with the mother and Delores in their apartment, or with both.

Defendant originally came from Philadelphia, Pennsylvania. He had been in the Air Force since March 30, 1954, and, at all times herein material, was assigned to duty at the Lincoln Air Force Base, being a staff sergeant. He was married in 1956. However, he and his wife separated and she obtained a decree of divorce on April 15, 1959, which did not become final until October 15, 1959. He was 22 years of age on July 22, 1959.

The evidence adduced would fully support a jury's finding that on July 22, 1959, Dennis and Donna Lou had supper with their mother in her and Delores' apartment; that between 8:30 and 9 p.m., the mother put them to bed in the living room of her apartment in the manner hereinbefore described; that about 10 p.m., after the children had gone to sleep, the defendant came up to the apartment and he and the mother went into the kitchen and visited, they being very good friends; that shortly before 11 p.m., the mother left the apartment to get some beer, closing and locking the door as she left; that when she left the defendant, Dennis, and Donna Lou were the only persons in the apartment; that no one else came into the apartment or left it while the mother was gone; that while the mother was gone Donna Lou awakened and found defendant lying on top of her, she being on her back, and sexually molesting her; that defendant had his hands over her mouth and that when she tried to cry out he put a hand on her neck and asked her if she wanted to live; that when she

said she did he told her not to yell; that he had put her panties down around her ankles and had unbuckled his pants and put them down; that he continued to sexually molest her; that when the mother came back she knocked on the door; that defendant then got up off of her, pulled up his pants and buckled them, and then opened the door; that Donna Lou, although she was crying and continued to do so, did not complain to her mother about what had happened to her as long as defendant was in the apartment because of her fear of him in view of what he had said to her; that about 11:30 p.m., Delores returned from work, she having left the apartment for that purpose prior to 5 p.m.; that later, between 12 and 12:30 a.m., defendant left the apartment, which was on the third floor, to go back to the base; that Delores went down stairs with him; that after defendant left the apartment Donna Lou told her mother that "Tex," whom she had previously seen in the apartment and knew, had sexually molested her; that the mother then called to Delores and asked her to come back to the apartment; that Delores did so, and as she did defendant followed her; that when he got back to the apartment the mother confronted him with what Donna Lou had said, which charges he denied; that the mother then said they would have to take Donna Lou to the hospital to have her examined; and that defendant then called the Lincoln air base and left the apartment shortly thereafter. Defendant was later found by the Lincoln police in the Provost Marshall's office at the base.

After defendant left the apartment Delores called St. Elizabeth Hospital and made arrangements to have Donna Lou examined. The mother and Delores, in the latter's car, then took Donna Lou to the hospital where she was taken to the emergency room. Dr. Bernard Rudis, an intern at the hospital, examined Donna Lou about 1 o'clock a.m., on July 23, 1959. He testified, because of her age, he did a modified pelvic examination;

that he found her hymen had been lacerated; that a tear extended about one or two millimeters into the vaginal wall; that there was bleeding and a moderate amount of mucoid material which was bloody; and that the child was quite disturbed. It was his opinion the child had been molested. It should be stated that the panties Donna Lou wore that night and the bed sheet she slept on were both offered in evidence and both were badly stained from blood, particularly the crotch of the panties.

Two officers of the Lincoln police force were at the hospital when the mother, Delores, Dennis, and Donna Lou arrived there. The officers were there on other business but when they became aware of the reason the Gaubs were there they asked them to come to the police station. As a result they all reported to police headquarters after Dr. Rudis had completed his examination. There each of them talked to Bobby W. Myers, a night lieutenant of the Lincoln police force. Lt. Myers testified Donna Lou made a complaint to him about what had happened to her, that is, that defendant had had intercourse with her. Donna Lou also testified to the fact that she told the man she talked to at the police station about what defendant had done to her.

While there is evidence to the contrary, especially that produced by defendant, we believe the evidence adduced by the State to be amply sufficient to furnish the necessary corroboration. In fact, it would be difficult to get a stronger case in the absence of eyewitnesses. For somewhat comparable situations when this court has held the evidence as to corroboration to be sufficient, see, Beer v. State, 129 Neb. 366, 261 N. W. 824; Robbins v. State, 106 Neb. 423, 184 N. W. 53; Kotouc v. State, 104 Neb. 580, 178 N. W. 174.

In view of what we have herein said and held, it is our opinion that the evidence is sufficient to sustain the jury's finding of guilt and that defendant had a fair trial. We therefore affirm the judgment of the trial court overruling defendant's motion for a new trial

and its judgment sentencing defendant to the Nebraska State Penitentiary.

AFFIRMED.

NETTIE CARTER, GUARDIAN OF TROY V. CARTER, INCOMPETENT, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, A CORPORATION, ET AL., APPELLEES.
103 N. W. 2d 152

Filed May 13, 1960. No. 34581.

1. **Railroads: Negligence.** A violation of a city ordinance regulating the speed of railroad trains is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby.
2. ———: ———. An instruction which informs the jury that it is not at liberty to find a railroad company negligent on account of the speed alone of a train approaching a crossing, but that the jury is at liberty to consider the speed at which the train was proceeding at the time of the accident with all the other evidence in the case in determining whether or not the railroad company was negligent, does not constitute prejudicial error.
3. **Automobiles.** A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor.
4. ———. A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual benefits of both the passenger and owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest.
5. ———. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation.
6. ———. The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other

relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged by the carriage, the relationship between the parties, and the purposes to which the transportation is incident.

7. **Negligence: Trial.** Where contributory negligence is pleaded as a defense, but there is no competent evidence to support such defense, it is prejudicial error to submit that issue to the jury.
8. **Railroads: Negligence.** Where contributory negligence of a plaintiff is taken from the jury by an instruction, it is prejudicial error to give other instructions imposing a duty upon such plaintiff to exercise due precautions and to look where he could see and listen where he could hear an approaching train.
9. **Trial: Appeal and Error.** Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and remanded for new trial.*

John J. Wilson, Healey, Wilson & Barlow, and *Kenneth Cobb,* for appellant.

Mason, Knudsen, Dickeson & Berkheimer, Richard M. Duxbury, J. W. Weingarten, Jack Devoe, and *Elmer M. Scheele,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action brought in the district court for Lancaster County by Nettie Carter as guardian of Troy V. Carter, an incompetent person, plaintiff, against the Chicago, Burlington & Quincy Railroad Company, a corporation, Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, Vermaas Service Station, Inc., a corporation, and United States Rubber Company, a corporation, defendants, to recover damages alleged by plaintiff to have been suffered by Troy V. Carter, resulting from a collision be-

tween an automobile, owned and operated by the defendant Roy Vermaas, and a train owned and operated by the defendant railroad company, occurring at the intersection of North Twenty-seventh Street, Lincoln, Nebraska, and the defendant railroad company tracks, on the evening of December 14, 1955.

The case was tried to a jury, resulting in a verdict in favor of the defendants Chicago, Burlington & Quincy Railroad Company, a corporation, Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, and Vermaas Service Station, Inc., a corporation.

The United States Rubber Company, a corporation, is in the case on the ground that it was and is obligated, pursuant to the workmen's compensation law of Nebraska, to make certain payments on behalf of Troy V. Carter who, at the time of the accident, was an employee of the defendant United States Rubber Company. This defendant filed an answer because of its claimed subrogation rights under the workmen's compensation law.

The plaintiff, Nettie Carter, guardian of Troy V. Carter, incompetent, filed a motion for new trial against the Chicago, Burlington & Quincy Railroad Company, a corporation, and a motion for new trial against the defendants Vermaas, as above designated. The trial court overruled both motions for new trial involving all defendants, of course except the United States Rubber Company. From the order overruling her motions for new trial, the plaintiff perfected appeal to this court.

All parties to this action agreed that at all times material to the case the defendants Roy Vermaas and Earl Vermaas were doing business as Vermaas Service Station; that Roy Vermaas was the owner and operator of the automobile involved in the accident; that Vermaas Service Station, Inc., was a corporation organized and existing under the laws of the State of Nebraska and a successor to Roy Vermaas and Earl Vermaas doing

business as Vermaas Service Station; that the defendant, Chicago, Burlington & Quincy Railroad Company was a corporation organized and authorized to do business in the State of Nebraska, and said defendant was the owner of the train and engine involved in the accident which was being operated by Mr. Merle White, an employee who at all times was acting in behalf of said company and within the scope of his employment; that Nettie Carter was the duly appointed, qualified, and acting guardian of Troy V. Carter, an incompetent person; and that the accident occurred within the limits of the city of Lincoln, Nebraska.

For convenience Troy V. Carter will be referred to as Carter, or plaintiff's ward; the defendant Chicago, Burlington & Quincy Railroad Company, a corporation, as Burlington; the owner and operator of the automobile here involved as Roy Vermaas; the defendants Roy Vermaas and Earl Vermaas, individually and doing business as Vermaas Service Station, and the Vermaas Service Station, Inc., a corporation, as defendants Vermaas, or as Vermaas; Marvin L. McGee as McGee; and Joe E. Tomsik as Tomsik.

The plaintiff's petition alleged that on the evening of December 14, 1955, while Troy V. Carter was riding at the request of Roy Vermaas in his 1955 Packard sedan and was being driven by Roy Vermaas to the "Steak House" owned by Earl Vermaas so that he could join them for certain contemplated business negotiations, and while proceeding north on North Twenty-seventh Street in the vicinity of the tracks of the defendant Burlington, Roy Vermaas did run into the path of a train that was proceeding in an easterly direction, resulting in a collision; and that said collision was the proximate result of the negligent and careless acts of omission and commission of the defendants and each of them, other than the United States Rubber Company, proximately resulting in injuries and damages which are fully set forth in the petition. The negligent

acts of omission and commission of the defendant Burlington and defendant Roy Vermaas are set out in the petition. The petition further alleged that as a proximate result of the negligent acts of the defendants alleged, severe and permanent injuries resulted to the plaintiff's ward. The prayer of the petition was for damages in a substantial amount.

The answer of the Burlington admitted the acts of negligence of the defendant Roy Vermaas alleged by the plaintiff's petition; denied negligence on its part; alleged that the accident was caused by the negligence of the driver of the automobile, and set out the negligent acts of omission and commission of Roy Vermaas as the driver of the automobile involved, and of plaintiff's ward; alleged that the driver of the automobile and the plaintiff's ward were engaged in a joint enterprise; alleged contributory negligence on the part of the plaintiff's ward, setting forth several allegations wherein this defendant claimed that such ward was guilty of contributory negligence; and denied the allegation of the petition as to the injuries sustained by the plaintiff's ward. The prayer was that plaintiff's petition be dismissed.

The answer of the defendants Vermaas admitted that the defendant Burlington was negligent as alleged in the plaintiff's petition; denied negligence on their part; alleged that the accident was proximately and directly caused by the negligence of the defendant Burlington, and set forth the specific acts of negligence of the Burlington; and alleged that at all times the plaintiff's ward rode within the automobile of Roy Vermaas as a guest. The answer prayed for dismissal of the plaintiff's petition.

By amendment to the plaintiff's petition, the plaintiff pleaded that at all times mentioned there was in full force and effect a city ordinance of the city of Lincoln, limiting the speed of trains within the corporate limits to 18 miles an hour.

The plaintiff assigns as error the following: (1) The trial court erred in giving instruction No. 27 which stated that the jury was not at liberty to find the Burlington negligent on account of the speed alone at which the train in question approached the crossing in question; (2) the trial court erred in giving instruction No. 27 which allowed the jury to consider the speed of the train in question only in connection with the negligence otherwise charged in plaintiff's petition; (3) the trial court erred in giving instructions No. 19, No. 28, No. 34, and each of them, which pertain to the duties of a driver and the occupant, or occupants, thus submitting to the jury the issue of contributory negligence of plaintiff's ward, after the court had determined as a matter of law that the plaintiff's ward was not contributorily negligent; (4) the trial court erred in giving instruction No. 25 which directed the jury to consider whether the parties or any of them were guilty of negligence, thus submitting to the jury the issue of the contributory negligence of the plaintiff's ward, after the court had determined as a matter of law that the plaintiff's ward was not contributorily negligent; and (5) the trial court erred in giving instruction No. 9 which allowed the jury to determine whether plaintiff's ward was a guest or passenger of Roy Vermaas at the time of the accident, when the evidence established that the conveyance was in furtherance of an overall plan for an evening's activities which were in the mutual business interests of the parties.

The record shows that Twenty-seventh Street in Lincoln runs north and south. The railroad crossings on North Twenty-seventh Street consist of tracks of the Chicago, Rock Island & Pacific Railroad, hereafter referred to as the Rock Island, which are located 180 feet south of the double tracks of the Burlington main line which run in a northeast and southwest direction, making an angle at the intersection at the southwest corner of the crossing of Twenty-seventh Street of approxi-

mately 55 degrees. The general area is within the city limits of Lincoln. The Chicago and North Western Railroad Company has a single track which crosses the Burlington tracks just to the west of Twenty-seventh Street, and crosses Twenty-seventh Street just north of the Burlington railroad crossing in a southwest and northeast direction. The Burlington crossing has protection devices at Twenty-seventh Street which consist of a signal installed on the east side of Twenty-seventh Street south of the crossing, containing a pair of red flashing lights facing south and mounted approximately 6 feet 3 inches above the level of the pavement, and an identical signal on the west side of Twenty-seventh Street, north of the crossing, facing north. The standard on the south side holding the flashing lights also contains a bell, a reflectorized cross-buck sign located above the flashing lights containing the words "Railroad Crossing," a reflectorized sign stating "3 Tracks," and a reflectorized sign placed below the flashing lights stating "Stop on Red Signal."

Approximately 16 feet south of the Burlington tracks and 13 feet west of the pavement on Twenty-seventh Street there is located a small signal instrument house, and there are no other obstructions on the east or west side of Twenty-seventh Street between the Burlington and Rock Island railroad tracks.

There is a line of trees running in an east-west direction 432.5 feet south of the Burlington crossing on the west side of Twenty-seventh Street, and a line of houses facing Twenty-seventh Street, south of the trees.

The above sufficiently describes the area relating to the place where the accident occurred.

The record discloses the following.

Marvin L. McGee, a salesman in the petroleum division of the United States Rubber Company, which we will hereafter refer to as the U. S. Rubber Company, testified that he knew Carter and helped him in his work with Champlin outlets in Carter's territory; and that

Roy Vermaas and Earl Vermaas were engaged in operating a Champlin service station in Lincoln at the time of the accident. This was a partnership business. Earl Vermaas is a brother of Roy Vermaas, and at the time of the accident, December 14, 1955, was the owner of the Steak House. McGee and Carter drove Carter's Buick automobile to the Vermaas Service Station where they met Roy Vermaas. The purpose of the meeting with Roy Vermaas was to endeavor to have the products of the U. S. Rubber Company distributed by Vermaas on a wholesale basis to new and existing service stations in the Lincoln trade area. McGee further testified that it had been planned that after dinner that evening they were going to work out a program concerning the stocking of merchandise and solicitation of other Champlin outlets; that the program was to be worked out at the Steak House; and that there were no plans to go to any home, office, or any place other than the Steak House following dinner. Vermaas desired to go home first and freshen up. He invited McGee and Carter to his home for refreshments before going to dinner. McGee, Carter, and Tomsik went to the Roy Vermaas house, had refreshments, and left for the Steak House after 20 or 30 minutes. McGee further testified that the purpose of going to the Steak House was to talk over the matter with Earl Vermaas, the brother of Roy Vermaas and partner in the service station business. Earl Vermaas testified that on December 14, 1955, he was in Scottsbluff, Nebraska; and that he left Lincoln the Sunday before the accident and did not return to Lincoln until the morning after the accident. McGee further testified that he never had any conversation with either Roy or Earl Vermaas relative to a planned meeting. Roy Vermaas invited McGee, Carter, and Tomsik to ride in his 1955 Packard sedan, which invitation was accepted. When they got into the car, McGee sat in the back seat immediately behind the driver, Roy Vermaas. To the right of McGee sat Tomsik, and Carter

sat to the right of Roy Vermaas in the front seat. McGee further testified that it was dark, the weather was cold, there was no snow, the windows in the car were not steamed over or frosted, the heater was on, and the car was comfortable. The conversation of Tomsik, Vermaas, Carter, and McGee, while riding in the car, was not related to business, but with reference to the interior of the car, and was a rather light conversation. McGee further testified that Roy Vermaas did nothing with reference to driving that attracted his attention. McGee testified that before the accident he was facing the front of the car; that there was no obstruction in front of him; that he was paying close attention to what was in front of him; that he was familiar with automatic lights at railroad crossings; that at no time before the accident did he see flashing lights or hear the whistle or bell of a train approaching; that there was nothing to prevent him from hearing a bell or whistle; that he did not see a headlight of a train in front of him; and that he remembered nothing about the actual accident.

On cross-examination McGee testified that he was not aware that they were approaching a railroad crossing just before the accident; that he did not listen for a train whistle or bell nor look for a headlight; that he never saw the train that hit the Vermaas car; and that he did not know if the signal lights at the crossing were within the range of his vision shortly before the accident.

Tomsik testified that he was a district sales manager for the Champlin Oil and Refining Company; that he knew Roy Vermaas through business associations; and that on December 14, 1955, the U. S. Rubber Company was marketing its products in Champlin service stations. He further testified that Roy Vermaas told him they were going out to dinner, then going to his house to write up the order and watch the fight. This witness called his wife in Norfolk and told her that after dinner

he would be at the Roy Vermaas residence, and gave her the telephone number there. He further testified that it was the intention to go in Carter's car, but Carter said he had supplies in the back seat of his car and not all of them could ride in his car. Thereafter Roy Vermaas offered the use of his car and Carter said that was a good idea as he had been wanting to ride in Roy's new car and now was the time to do so. He further testified that he accompanied McGee and Carter in the Roy Vermaas car in an advisory capacity to Roy Vermaas because of his knowledge of certain elements of service station business, however, he had nothing to do with any agreement or contract that might be entered into by Vermaas and the representatives of the U. S. Rubber Company. They started north on Twenty-seventh Street to go to the Steak House for dinner, and the speed of the Vermaas car was from 25 to 30 miles an hour. He remembered approaching the point where the accident happened. He was familiar with the fact that there were railroad crossings on North Twenty-seventh Street and flashing lights located at the railroad crossings. Before they arrived at the crossings, he saw some red lights flashing. This was when they were 100 to 200 yards south of the Rock Island tracks. The only other lights he could see were neon lights about a quarter of a mile north of the Burlington crossing. He further testified that the red lights he saw as they approached the point where the accident happened went out a short time after he sighted them. After these lights went out, he watched straight ahead. The flashing lights on the right side of the street never did come on. He further testified that he did not hear a whistle, nor did he see a beam of light from a headlight of an engine; and that there was nothing to obstruct his view.

On cross-examination Tomsik testified that he could not tell whether he was looking at the Burlington or Rock Island flashing lights; that he thought he saw a

train about the time he saw the flashing red light; and that when the light went out it was about the same time that a train going east passed by the crossing. He did not see the train that hit the Vermaas automobile. He also testified that when Roy Vermaas invited him to dinner, Vermaas told him that they were going out to dinner then to the Vermaas house for a meeting and to write up an order with the U. S. Rubber Company; that while he was present at the Vermaas house and on the way to dinner, he heard nothing said with reference to a tire order or other business; and that the purpose was to go to the Steak House for dinner and return to the Vermaas house where an order would be written up between Vermaas and the representative of the U. S. Rubber Company.

Roy Vermaas testified that he was the active manager of the Vermaas Service Station and handled Champlin products; that Earl Vermaas owned the Steak House; and that he, Roy Vermaas, had no financial interest in the Steak House. He further testified that he knew Carter and purchased tires from him; and that Carter on occasions suggested a change in the relationship between the U. S. Rubber Company and the Vermaas Service Station business, the idea being to set up a U. S. Rubber Company distributor to furnish new service stations with tires, batteries, and accessories. This witness further testified that he saw Carter and McGee on December 14, 1955, when they drove to the service station between 4:30 and 5 p.m., in Carter's Buick automobile. At that time Carter wanted to know if they could get started on an order. Roy Vermaas told Carter it was late, and he would rather have McGee and Carter come to his house after dinner. McGee and Carter then invited Vermaas to dinner. He accepted the invitation. Carter asked Vermaas if he would call his wife and find out if she would like to go to dinner, and then Carter would call his wife and invite her. Vermaas was unable to contact his wife by telephone, and invited Carter and

McGee to his home for refreshments, and they agreed to this. Afterward, when McGee, Carter, and Tomsik were at the Vermaas house, Roy Vermaas mentioned that it was about 10 minutes until 7 o'clock and the reservation had been made at the Steak House for 7 o'clock. Roy Vermaas further testified that when the parties left his house Carter endeavored to remove certain materials used by salesmen from his car, and Vermaas told Carter that was not necessary, that they would take the Vermaas car. He further testified that he drove north on Twenty-seventh Street, and maintained a rate of speed of 30 miles an hour; and that as he approached the railroad crossing the headlights on his car were operating satisfactorily, all of the windows and the windshield were clear, and all other mechanical parts of the car were in good operating condition. When he was about a block from the Burlington railroad crossing, he looked to see if any signals were flashing, and there were none. When he was about half a block from the railroad tracks, he looked to the right and left and did not see a train approaching from either direction. At that time the flashing lights of the railroad crossing signals were within his range of vision, and none of them were flashing. As he proceeded closer to the railroad tracks, he looked to see if the signals were flashing. They were not, so he crossed the Rock Island railroad tracks and approached the first Burlington railroad track. He looked again to see if the signals were flashing on the right side of Twenty-seventh Street as he proceeded north, and they were not. He again looked to his left and did not see any lights of a train, or a train approaching on any of the railroad tracks. He observed the Burlington flashing light signal on the east side of Twenty-seventh Street, and this signal was not flashing, so he continued across the Burlington railroad tracks. He heard no warnings of the approach of a train, and there was no warning from anyone in the automobile. As he started across the Burlington rail-

road tracks his automobile came in contact with a train, and he remembered nothing until the next afternoon. He further testified that he had no plans or intention of discussing business matters with McGee or Carter at the Steak House, and no arrangements had been made to that end by anyone.

The engineer on Burlington train No. 305, involved in the accident, testified that the engine was a small diesel engine used for freight or passenger service. He further testified that he sat on the right side of the engine about 8 feet from the front of it; that from the top of the engine to the ground would be about 15 or 16 feet; and that the controls of the engine were to his left and at his fingertips. He explained the different instruments, the automatic brakes and the brake system as it operates the train, and testified that the train was equipped with a sanding device in connection with the braking system. He further testified that he applied his emergency brake at the time of the accident; that the fireman rode on the left side of the engine and occupied that position at the time of the accident; and that the train consisted of one coach coupled to the engine, and was en route to Omaha as an extra train. He further testified that the train left the passenger station between P and Q Streets on Sixth Street at approximately 6 p.m. Before leaving the depot, he turned on the electrically operated engine bell. This bell would ring continuously until it was shut off, and it was not shut off that night between the time the train left the depot and the time it stopped after the accident. The bell weighed in excess of 30 pounds. The engine was equipped with a Mars headlight which oscillated in a figure-8 pattern, and with a steady beam light below the Mars light. This witness further testified that both lights were turned on before starting the train, and remained on continuously thereafter. When the train arrived at the dwarf signal at the Missouri Pacific crossing it was going at a rate of approximately 15 miles an hour. Thereafter its speed

was increased to 31 to 32 miles an hour between the Seventeenth and Twenty-seventh Street crossings. This witness further testified that he gave the regular crossing signal of two long blasts of the whistle, one short blast, and another long blast, until the train reached the crossing at Twenty-seventh Street. The engineer further testified that as he approached the Twenty-seventh Street crossing he watched the overhead signal on the signal bridge west of Twenty-seventh Street which controls the south track; that he had seen this signal turn green at the Missouri Pacific crossing at Eleventh Street; that he first saw the flashing lights on the south side of the Twenty-seventh Street crossing when he was approximately 2,000 feet from Twenty-seventh Street, and observed they were operating; and that he first saw the Roy Vermaas automobile on Twenty-seventh Street south of the railroad crossing when it appeared past the line of evergreen trees north of the last house located on the west side of Twenty-seventh Street 432.5 feet south of the crossing. The headlights on the Vermaas automobile were on. The train was then approximately 600 feet from the crossing, and the engineer's vision was not obstructed when he looked toward the Vermaas automobile. He further testified that he checked the overhead bridge signal, the motor gauges, and looked down the track to see if it was clear. He did not apply his brakes when he saw the Vermaas automobile the first time, for the reason that he estimated the speed of that automobile to be 20 or 25 miles an hour, which was not fast, and he was unable to tell whether or not the driver of the car was going to stop. He further testified that he next saw the Vermaas automobile an instant before the impact when it was 2 or 3 feet from the engine. At that time he applied his emergency brakes. The train stopped approximately 600 feet east of the crossing. The train was backed up a minute or so later, until the rear part of it was 75 to 100 feet east of the signal bridge located east of

Twenty-seventh Street. This witness further testified that train No. 305 passed train No. 273 going east on the north track about halfway between Seventeenth and Twenty-seventh Streets.

The fireman on train No. 305 testified that the headlight and the Mars light were operating from the time the train left the depot. When train No. 305 was approaching the crossing on Twenty-seventh Street, he could see the red lights flashing on the south side of the crossing from the time the train was 1,000 feet west of Twenty-seventh Street. The last time he looked at the south signal was 100 feet west of the crossing. He further testified that he heard the whistle of the engine sounding when the train was 600 or 700 feet west of Twenty-seventh Street. The last whistle blast lasted until the train reached the railroad crossing. He estimated the speed of train No. 305 at about 30 miles an hour as it approached Twenty-seventh Street. He further testified that he observed the overhead signal on the bridge west of Twenty-seventh Street until it went out of sight, and the signal was clear.

The rear brakeman and flagman on train No. 305 testified that he rode in the coach; and that he got off of the rear of the train after it stopped, and walked back to warn other trains. He gave as his opinion that train No. 305 was traveling from 30 to 35 miles an hour when it crossed Twenty-seventh Street. He testified that the lights in the coach were on; that he heard the engine whistle as the train approached Twenty-seventh Street; and that he saw the flashing lights on Twenty-seventh Street after the accident as he walked back to the Vermaas automobile.

The conductor on train No. 305 testified that he was seated in the rear seat of the coach on the south side filling out forms. He estimated the speed of the train as it approached the Twenty-seventh Street crossing to be 30 to 35 miles an hour. As the train crossed Twenty-seventh Street, he observed the flashing lights operating

on the south side of the crossing. He further testified that he made a record of the train stops as he was required to do, and which he did that night; and that when train No. 305 stopped it was 7:10 p.m. by his watch. This was verified by a delay report made out by the conductor. He further testified that he called the dispatcher from a telephone located near the signal bridge east of Twenty-seventh Street, and informed the dispatcher of the accident.

The other brakeman on train No. 305 was on the north side of the coach. He testified that he observed that the engine's lights were on when the train left the depot. He estimated the speed of the train at approximately 35 miles an hour. He further testified that he observed the light in the side of the flashing signals at the Twenty-seventh Street crossing.

The engineer on train No. 273 which was composed of 27 freight cars and proceeding east from Lincoln on the north track of the Burlington, testified that train No. 273 stopped 200 feet west of the signal bridge west of Twenty-seventh Street due to motor trouble; that the signal on this bridge was green when the train stopped, and turned red shortly afterward; that the steady beam light and the Mars light were operating on train No. 273; that train No. 305 passed train No. 273 just east of Seventeenth Street; that in his opinion train No. 305 was going at a rate of speed of 30 miles an hour when it passed train No. 273; that he estimated the speed of train No. 273 was from 5 to 14 miles an hour; that he observed the headlight and Mars light on train No. 305, and the coach lights, all of which were operating; and that he heard the whistle of train No. 305 as it approached the Twenty-seventh Street crossing.

The conductor on train No. 273 testified that he was sitting in the caboose when this train stopped at the signal bridge west of Twenty-seventh Street at 7:10 p.m. Thereafter he walked to Twenty-seventh Street and observed the crossing signals operating. He ob-

served the headlights on train No. 305 as it came up behind train No. 273 before passing it, and they were operating. Train No. 273 was delayed somewhat due to motor trouble, and was eastbound to Pacific Junction, Iowa.

Thelma Olson testified that she resided one block north and one block west of the railroad tracks here involved; that on the day of the accident she saw the mail train on the Burlington tracks cross Twenty-seventh Street at 2 p.m.; and that the flashing light signals were working. She further testified that she arrived at the place of the accident about 3 minutes after it happened; that she heard the whistle of the train, and noticed a train sitting on the east side of the crossing; and that the flashing signals were still working at that time.

Leora Johns testified that she saw the accident when she was driving her automobile north on Twenty-seventh Street; and that as she was crossing the Rock Island tracks she saw the swinging Mars headlight on the train when it was a block west of Twenty-seventh Street. She did not remember whether she heard a train whistle or saw the flashing signals operating, nor did she remember if she looked to see if the flashing lights were operating.

Dr. Alfred Hausrath, a mechanical engineer, after setting forth his qualifications and the manner, form, and technique used to discern the speed of automobiles, trains, and vehicles in general, determined that train No. 305 was traveling at a rate of speed of 52 miles an hour at the time of the collision.

Another expert, a consulting engineer and college professor who had conducted and participated in a great many tests of brake shoes and the stopping ability of trains, made an analysis from certain facts using his knowledge with reference to the subject matter, and determined that train No. 305 was traveling at a rate of speed of 55.2 miles an hour at the time of the collision.

A consulting engineer with many years experience

doing research in engineering for large companies testified that by taking into consideration certain facts, and by his expert knowledge and analysis, he concluded that train No. 305 was operating at a speed of 52.2 miles an hour at the time of impact.

A Lincoln city police officer, connected with the traffic division and whose duty it was to investigate automobile accidents, testified that he was called to the scene of the accident at the Burlington crossing on North Twenty-seventh Street, on December 14, 1955, arriving there at approximately 7:20 or 7:25 p.m. He observed the Vermaas car 12 or 15 feet south of the south track of the Burlington. From measurements taken from the south Burlington track this automobile was 193 feet east of Twenty-seventh Street. On cross-examination this witness testified that he observed the cross-buck signals, and they were flashing off and on.

The plaintiff contends that excessive speed of a train within the city limits of a city, when in violation of an ordinance, is in itself sufficient evidence of negligence to hold the railroad company liable for injury, if the jury finds that such excessive speed was a contributing cause of the injury.

In this connection, the plaintiff attacks instruction No. 27 given by the trial court to the jury as constituting prejudicial error. Instruction No. 27 reads as follows: "You are instructed that you are not at liberty to find the defendant railroad company negligent on account of the speed alone at which the train in question approached the crossing in question, but you are at liberty to consider the speed at which the train was proceeding at the time of the accident with all the other evidence in the case, in coming to a conclusion as to whether said defendant railroad company is chargeable with the negligence otherwise charged in plaintiff's petition."

The plaintiff's petition charged the Burlington with negligence in the following respects: (a) Failure to maintain proper observation; (b) failure to maintain

proper signal devices; (c) failure to sound any audible warning of the approach of the train to the crossing; (d) failure to have a headlight in operation; (e) operating the engine without proper warning lights; (f) operating the engine at an excessive rate of speed, to wit, in excess of 18 miles an hour in violation of an ordinance limiting speed within the city limits to 18 miles an hour; (g) maintaining defective signal devices at crossing; and (h) although the engineer saw, or should have seen, the approach of said vehicle, he acted in disregard of such knowledge.

At the time of the accident there was in full force and effect an ordinance of the city of Lincoln which provided that no train should be run over any railroad within the corporate limits of the city of Lincoln at a greater speed than 18 miles an hour.

As heretofore mentioned, there is evidence that the speed of the Burlington train in approaching the crossing was in violation of the city ordinance. The trial court, in instruction No. 25, informed the jury that the violation of the city ordinance was not in and of itself negligence, as a matter of law, but the violation thereof was evidence of negligence which the jury should consider together with all the other evidence in the case to determine whether or not the parties, or any of them, were guilty of negligence. While instruction No. 25 will be considered in connection with another assignment of error, insofar as it relates to the violation of the city ordinance, it is a proper instruction.

It is the rule of this court that: "A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby." Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82, 149 A. L. R. 1041. See, also, O'Neill v. Henke, 167 Neb. 631, 94 N. W. 2d 322; Gleason v. Baack, 137 Neb. 272, 289 N. W.

349. The same rule would apply to the operation of trains within the city limits in violation of a city ordinance.

From our research, we find no case in this state holding that the excessive speed of a train, in and of itself, constitutes negligence per se.

Instruction No. 27 given in the instant case is substantially the same as an instruction appearing in the case of Kepler v. Chicago, St. P., M. & O. Ry. Co., 111 Neb. 273, 196 N. W. 161. This court said that the court did not err in giving instruction No. 14, in substance that the jurors were not at liberty to find the defendant negligent in running its train at the rate at which it was running, but were at liberty to consider the speed of the train in connection with other negligence in the manner charged. The court said: "There can be no error in this instruction. If the train was being run at a high rate of speed and the engineer was engaged in getting everything out of his engine that it could accomplish, it is possible that his intentness upon the matter of speed might make him forgetful of his duty to ring the bell or blow the whistle. * * * And it sufficiently appears that the court otherwise in such instruction indicated that the matter of speed was not in itself a ground of negligence."

Instruction No. 27 does not prohibit the jury from considering speed as evidence of negligence if the jury found there was a violation of the city ordinance. There are other instructions relating to this subject matter which we deem unnecessary to set forth. We conclude that instruction No. 27 given by the trial court did not constitute prejudicial error.

The plaintiff contends that the evidence discloses that the purpose of using the automobile of Roy Vermaas was to further the mutual business interests of the parties, and that the trial court erred in failing to instruct the jury that, as a matter of law, Carter was a

passenger and not a guest in the Roy Vermaas automobile at the time of the accident.

Section 39-740, R. R. S. 1943, provides in part: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle. For the purpose of this section, the term 'guest' is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, * * *."

It is necessary in this case, in order to arrive at a decision herein, to determine the status of Carter while he was riding in the Roy Vermaas automobile, that is, was Carter a guest or a passenger? The burden of establishing Carter's status as a passenger was on the plaintiff. Lincoln v. Knudsen, 163 Neb. 390, 79 N. W. 2d 716.

In Born v. Estate of Matzner, 159 Neb. 169, 65 N. W. 2d 593, we said: "A guest by the terms of section 39-740, R. R. S. 1943, is a person who accepts a ride in a motor vehicle without compensation therefor." See, also, Eilts v. Bendt, 162 Neb. 538, 76 N. W. 2d 623.

The next question is whether or not there was an issue of fact on this question. We said in Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 8 N. W. 2d 451, that: "If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case."

"The question of whether a person riding in a motor vehicle is a guest, or engaged in a joint enterprise, or other relationship, is generally one for determination in the individual case. It must be ascertained from facts establishing the identity of the persons advantaged

by the carriage, the relationship between the parties, and the purposes to which the transportation is incident." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Paxton v. Nichols, 157 Neb. 152, 59 N. W. 2d 184.

"The phrase 'without giving compensation therefor' (Comp. St. Supp. 1939, section 39-1129, now section 39-740, R. R. S. 1943) indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Born v. Estate of Matzner, *supra*.

"A person riding in a motor vehicle is a guest if his carriage confers only a benefit upon himself and no benefit upon the owner or operator except such as is incidental to hospitality, social relations, companionship, or the like, as a mere gratuity. However, if his carriage contributes such tangible and substantial benefits as to promote the mutual interests of both the passenger and the owner or operator, or is primarily for the attainment of some tangible and substantial objective or business purpose of the owner or operator, he is not a guest." Van Auker v. Steckley's Hybrid Seed Corn Co., *supra*. See, also, Gunn v. Coca-Cola Bottling Co., 154 Neb. 150, 47 N. W. 2d 397; Born v. Estate of Matzner, *supra*.

"A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation." Born v. Estate of Matzner, *supra*.

There would be no useful purpose in citing and discussing cases from foreign jurisdictions for the reason that we have said that each case must stand on its own facts, and those facts must be gauged by the standards

which we have heretofore determined should be applied thereto.

We have heretofore set out the evidence relating to this issue and shall not repeat it. Under the controlling standards heretofore set out, we think the evidence establishes as a matter of law that Carter was riding in the Roy Vermaas automobile as a guest at the time of the accident. It is true, the trial court submitted the issue as to whether Carter was a guest or passenger in the Roy Vermaas automobile to the jury in instruction No. 9. In the light of our conclusion, discussion of instruction No. 9 becomes unnecessary, and the plaintiff's assignment of error cannot be sustained.

The plaintiff contends that the trial court committed prejudicial error in submitting to the jury issues as to duties of care imposed upon an occupant of an automobile which has been struck by a railroad train, when there was no evidence in the record as to the negligence on the part of such occupant.

The trial court, in instruction No. 10, instructed the jury that there was no sufficient evidence to sustain a finding of negligence on the part of plaintiff's ward, and therefore all allegations and claims of negligence against Carter were withdrawn from the consideration of the jury.

The trial court, in instruction No. 34, instructed the jury: "You are advised that the existence of automatic signals at a crossing does not excuse the driver and an occupant of a motor vehicle from exercising due precaution and looking where he could see, and listening where he could hear, for an approaching train." Instruction No. 34 was requested by the Burlington.

The words "an occupant," insofar as the jury was concerned, would mean Carter as an occupant of the Roy Vermaas automobile at the time of the accident. Instruction No. 34 directed the attention of the jury to the question of a duty imposed upon Carter in looking and listening for an approaching train. The language

in instruction No. 34 stating that the presence of signals does not "excuse" an occupant of the Roy Vermaas automobile from exercising due care and caution and looking where he could see and listening where he could hear an approaching train, submits the issue of possible failure to exercise precaution, or failure to look, or failure to listen, to the jury.

In Anderson v. Nielsen, 162 Neb. 110, 75 N. W. 2d 372, this court said: "It is of course true that if there was no contributory negligence shown on the part of plaintiff it was prejudicial error to submit that issue to the jury. The controlling rule appears in Allen v. Clark, 148 Neb. 627, 28 N. W. 2d 439, as follows: 'Where contributory negligence is pleaded as a defense, but there is no evidence to support such defense, it is prejudicial error to submit such issue to the jury.' See, also, Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88; Scott v. Service Pipe Line Co., 159 Neb. 36, 65 N. W. 2d 219; Fick v. Herman, 159 Neb. 758, 68 N. W. 2d 622."

Since the evidence does not substantiate any such claim of contributory negligence on the part of Carter, the submission of the issues contained in instruction No. 34 constituted prejudicial error.

In instruction No. 25, which has heretofore been referred to, the trial court instructed the jury: "If you find that any of the parties to this action violated any of the laws of the State of Nebraska which are set forth in these instructions, or any of the ordinances which were received in evidence during the trial and which are referred to in these instructions, you are instructed that the violation thereof is not in and of itself negligence, as a matter of law, * * *." This instruction submitted the contributory negligence of Carter to the jury after the trial court had determined, as a matter of law, that Carter was not contributorily negligent.

It might be well to point out that the mere fact that

the action was brought by the guardian of Carter, declared to be an incompetent, does not mean that he is not a party to this litigation. He is, in fact, the real party in interest as far as the plaintiff's case is concerned, and he was so treated in the court's instructions to the jury.

In instruction No. 28, the trial court instructed the jury: "The failure of the crossing protection flasher signals to operate at a railroad crossing does not relieve the driver or occupant of an automobile about to cross the tracks from the duty to use due care to look and listen for an approaching train."

Instruction No. 25 and instruction No. 28 are subject to the same objections, that is, that by instruction No. 10, the trial court eliminated any question of the alleged negligence on the part of Carter. By the instructions as above set out the trial court placed before the jury the question of whether Carter, as an occupant of the Roy Vermaas automobile, fulfilled certain duties as are set forth in such instructions. We believe the following to be applicable.

In Barney v. Adcock, 162 Neb. 179, 75 N. W. 2d 683, this court said: "Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby because it is impossible to know which of the directions the jury followed. Peterson v. Chicago, M. & St. P. Ry. Co., 101 Neb. 3, 161 N. W. 1043; Bryant v. Modern Woodmen of America, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. N. S. 326, 21 Ann. Cas. 365; Sanderson v. Huffman, 132 Neb. 321, 271 N. W. 870; Hief v. Roberts Dairy Co., 138 Neb. 885, 296 N. W. 331; Harsche v. Czyz, 157 Neb. 699, 61 N. W. 2d 265."

While the plaintiff predicated error on the giving of instruction No. 19 and the Burlington argued that the giving of this instruction was proper, we believe it is unnecessary to discuss the giving of instruction No. 19 for the reason that the instructions heretofore mentioned and discussed constitute prejudicial error.

We conclude that the plaintiff's assignment of error relating to the instructions above discussed should be sustained for the reason that they constitute prejudicial error.

Under the evidence shown in the record, we conclude that it is sufficient to submit to the jury, under proper instructions, the issue of negligence on the part of the Burlington, and the issue of gross negligence on the part of the defendant Roy Vermaas.

While there are other assignments of error presented on this appeal, inasmuch as a new trial must be had, we deem it unnecessary to discuss such other assignments of error.

For the reasons given herein, the judgment of the trial court should be and is hereby reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

LOUISA KUNZ, APPELLANT, IMPLEADED WITH GOLDA HAITH ET AL., APPELLEES, V. H. L. BORNEMEIER ET AL., APPELLEES.

102 N. W. 2d 842

Filed May 13, 1960. No. 34733.

1. **Highways: Adverse Possession.** A public highway may be established by prescription by continuous adverse use thereof by the public for a period of 10 years.
2. **Highways.** In determining the question of whether or not a public highway has been established by dedication the court is required to examine the proceedings had to ascertain if the jurisdictional requirements necessary for that purpose have been met.
3. ———. If the jurisdictional requirements for the establishment of a public highway by dedication have not been met the lapse of time will not supply the defect.
4. **Bridges: Counties.** In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of discretion.

5. **Bridges: Mandamus.** It is a general principle that the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Johnston & Grossman and *Norman F. Langemach*, for appellant.

James F. Begley, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action wherein Louisa Kunz, Golda Haith, and Kenneth Haith, plaintiffs, instituted an action in the district court for Cass County, Nebraska, against H. L. Bornemeier, W. F. Nolte, and Melvin R. Todd, county commissioners of Cass County, Nebraska, defendants, the purpose of which was to obtain a writ of mandamus requiring the defendants to rebuild, restore, or replace a bridge and maintain a section-line public highway on the line between Section 4, Township 10 North, Range 10 East, and Section 9, Township 10 North, Range 10 East, in Cass County, Nebraska, which line was alleged to be 1 mile of a road designated as No. 169. Highway No. 169 is a road 8 miles in length.

A trial was had to the court and the writ of mandamus was denied. A motion for new trial was filed and in due course overruled. From the judgment denying the writ and the order overruling the motion for new trial, the plaintiff Louisa Kunz has appealed.

By the petition the plaintiffs substantially alleged that the area involved was and still is a public highway which has never been vacated, and that it was at one time used as a United States mail route; that they are the owners of 80 acres of land which is of the value of

$20,000 in Section 4 which abuts, adjoins, and is contiguous to this line; that there is no other adequate and proper means of ingress or egress to this land; and that the plaintiffs, the traveling public, and the taxpayers of Cass County are entitled by law to have the highway and a bridge across it maintained in a reasonable and passable condition.

It is further alleged, again substantially, that although it was the duty of the defendants to rebuild, restore, or replace the bridge and maintain the highway they have failed so to do.

The defendants Bornemeier and Todd filed separate answers which in all material respects are the same. They admitted that the land in question was owned by the plaintiffs Louisa Kunz and Golda Haith. There was a general denial of the other allegations of the petition. This was followed by affirmative allegations, in substance, that another public highway had been established which gives adequate ingress and egress to the land directly involved; and that the cost and expense of constructing and maintaining the bridge and road would entail an unwarranted expense of public funds and a breach of the discretion with which they are clothed as county commissioners.

The defendant Nolte filed a separate answer concerning which it is necessary to state here only that by it he declared that the road and bridge in question were not passable and usable; and that he at no time voted to deny the relief prayed by plaintiffs in this action. The answer concluded with a prayer for instruction by the court as to his duty.

The judgment was based on a finding that the defendants Todd and Bornemeier exercised their best judgment and discretion in the performance of their official duties in denying the request of plaintiffs to open the section-line road and restore the bridge involved in this dispute, and that they did not act arbitrarily, capriciously, or unreasonably.

The appellant has set forth in her brief five assignments of error. There are however but two questions presented for consideration. The first is that of whether or not the judgment is contrary to the evidence and the other is that of whether or not it is contrary to law.

Before entering upon a consideration of the assignments of error it appears necessary to consider the theory on which the case was presented by the petition and a defense thereto which is presented by the answers of the defendants Bornemeier and Todd, but not responded to by the judgment.

The theory is, as has been pointed out, that the appellant is entitled to have this mile maintained and the bridge kept in repair for the reason that this is an established public highway. The position of the defendants Bornemeier and Todd is that this was never established as a public highway.

It is true that if this has never been established as a public highway no right on the record made in this case flows in favor of the appellant to have it opened and maintained. Highways may be established in two ways. One is by dedication and the other is by prescription.

"A public highway by prescription may be established by continuous adverse use thereof by the public for a period of ten years." Lancaster County ex rel. Rosewell v. Graham, 120 Neb. 785, 235 N. W. 338.

The question of whether or not this was established as a highway by prescription must be decided adversely to the appellant. There is no evidence to support a finding that the mile was ever, over any continuous period of 10 years, used by the public as a highway.

In determining the question of whether or not a highway has been established by dedication the court is required to examine the proceedings had to ascertain if the jurisdictional requirements necessary for that purpose have been met. If they have not been met the right does not exist and lapse of time will not

supply the defect. See, Peterson v. Fisher, 71 Neb. 238, 98 N. W. 660; Rosenbery v. Tibke, 88 Neb. 51, 128 N. W. 647; State ex rel. Draper v. Freese, 147 Neb. 147, 22 N. W. 2d 556.

There was no effort made on the trial to prove the establishment of this as a road by dedication except by evidence of some proceeding in about 1870. The proper statutory procedure at that time required the posting of notice on the courthouse door and in three other public places for at least 20 days and then the filing of a petition with the board of county commissioners. See R. S. 1866, c. 47, § 19.

The statute required that the petition be signed by at least 10 landowners who were residents of the county. It then became the duty of the board of county commissioners to conduct a hearing of the interested parties, and if in their judgment it appeared probable that the location or change proposed would advance the interests of the county, or was essential to the best interests of the applicant, it became their duty to appoint a commissioner to proceed to view the road proposed. If in the opinion of the commissioner the public good required this, it became his duty to lay out, mark, and plat the road. See R. S. 1866, c. 47, § 20.

Within 20 days after making the survey and location it was the duty of the commissioner to make and file his report, together with the plat and field notes, with the county clerk. After this was done a road was deemed established. See R. S. 1866, c. 47, § 21.

The record fails to disclose that all of the essential requirements of these three sections of the statute were complied with. Whether or not there was a notice acceptable under the terms of the statute; a sufficient petition; a proper hearing; or even that a commissioner was properly appointed is not disclosed. This lack of adequate information in these areas is quite likely accounted for by a failure of public officials at that time to keep proper and sufficient records of proceedings.

It is certain however that a purported commissioner made a report to the board of county commissioners. If the antecedent proceedings were proper the effect of the report made by him pursuant to the terms of section 21 was to establish this mile as a part of public highway No. 169.

While of course it is a matter of no controlling significance it is true, as is disclosed by their testimony, that the defendants Bornemeier and Todd regarded this as a part of a public highway in the county.

In the light of the record made it will be assumed, but not for all purposes decided, that this was a 1-mile portion of a previously established public highway.

Coming then to the basis on which the case was decided by the trial court, that is, on the question of whether or not the county commissioners properly refused to build the bridge or maintain the road, resort must be had to the particular facts surrounding the situation and the law applicable thereto.

The principles by which the county commissioners are to be controlled and their acts adjudged in a situation such as this are set forth in State ex rel. Heil v. Jakubowski, 151 Neb. 471, 38 N. W. 2d 26, as follows:

"In determining the character of repairs to be made to bridges, and what bridges shall be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of such discretion.

"It is a general principle that the building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course." See, also, State ex rel. Draper v. Freese, *supra;* State ex rel. Weinberger v. Gormley, 155 Neb. 242, 51 N. W. 2d 343.

The evidence indicates that this mile of highway is on the section line between Section 4 on the north and

Section 9 on the south. It is a part of a highway which apparently starts 2 miles west of these two sections and extends eastward a distance of 8 miles. This is known as highway No. 169. At the west end of this mile of highway is a usable and used north and south public highway extending in both directions well beyond any land to which this litigation pertains. It has not been made clear whether or not No. 169 west of the north and south road was in use at the time of the trial. It is reasonably inferable that the highway east of this mile was being maintained and used. There is no convincing evidence that any part of the mile was ever maintained for use or used as a public highway, except a small part of the west end. A short distance east of the west end of this mile is a creek which crosses the highway. The exact distance of the creek from the north and south highway is not shown but it appears to be less than ⅛ mile. At one time there was a bridge across this creek, but in about 1950 it was washed out and has never been replaced. Whether or not the bridge was built by the county is not disclosed. Whether or not the portion of the highway to the west was maintained by the county does not clearly appear. There was no maintenance after the bridge was washed out. There is no evidence that the bridge and the road to the west was ever used by anyone except the owner and occupant of 80 acres of land bounded by this mile of highway on the south and the west line of Section 4 on the west. In order to open this mile of highway for use it would be necessary to construct a bridge across the creek, construct three culverts, and grade the road for travel. An engineer estimated the total cost of this at $24,530. Another estimate was at least $11,000 to $12,000. A witness for appellant testified that the cost of constructing a bridge by utilizing one which had been used elsewhere would be about $2,500, and that the cost of putting the road in usable condition would be an additional $1,000. It is clear that this witness

had no real information as to costs and requirements in an instance such as this and no reliable information as to the availability of a used bridge.

There are no buildings on either side of the highway to which anyone was seeking to have access over this mile. Also there was no evidence that anyone had any purpose to do any construction work thereon which would require access. In fact no one expressed a desire or intention to use this highway if opened and maintained, except a tenant on a year-to-year basis on 80 acres of land owned by plaintiffs. This land abuts this highway to the north for a width of ¼ mile. Its west boundary is ¼ mile east of the west line of Section 4 and its north boundary is the east-west half-section line of Section 4.

The present practical reasons given for opening and maintaining the highway were that it would furnish this tenant with a shorter route over which to deliver the products of his farming operation to market; that it would furnish a shorter route for transportation of fertilizer; and that it was wanted for convenience of planting and harvesting crops. This tenant does not live on the land and his home is not in the direction of the market to which he refers but is 3½ miles to the south and 1 mile to the west of the 80 acres of land.

This tenant became such in 1959. At that time there was no access road to the 80 acres of land. The county commissioners, in order to provide access, purchased, established, and made usable an access road thereto at a cost to the county of about $1,250. This road is 2 rods in width and it extends eastward to the northwest corner of the 80 acres on the half-section line of Section 4 from the north and south road along the west side of the section. It is nowhere contended that as a road this is not satisfactory. The only complaint made about it was that since this gave an entrance way of only 16½ feet it was not of sufficient width. The record however

shows that this was corrected by the county commissioners by providing for a wider entrance way.

The only other suggested reason is that in prospect is the improvement of State Highway No. 1 and that it would be worthwhile to have this mile opened for the purpose of providing better access to that road. This of course is entitled to no present consideration.

The only present benefit which could flow from the construction of this bridge, these culverts, and the maintenance of the highway would be the purposes advanced by the tenant which have already been pointed out. The maximum advantage to the tenant would be a saving of 2 miles on a one-way trip to market and 1 mile on a trip to his residence.

In the exercise of their discretion in determining whether or not this bridge should be constructed and the other things done necessary to make this mile of highway fit for use, it was the right of the county commissioners to investigate the question of need or general demand; the work required; the cost; and the question of whether or not there are sufficient funds, in the light of the entire picture of the county road situation, to permit the demanded construction and maintenance.

As pointed out herein where, as here, county commissioners deny an application, mandamus will not lie to compel action unless there has been a clear abuse of discretion. See, State ex rel. Heil v. Jakubowski, *supra;* State ex rel. Weinberger v. Gormley, *supra.*

The question of need and utility as well as estimates of cost have been pointed out herein. In addition to this, among other things not deemed necessary to be mentioned, a single statement as to physical conditions relative to county highways and highway bridges and the financial status of the county with relation thereto demonstrates clearly that in the present instance there was no abuse of discretion. In the county, at the time of trial, there were 16 bridges washed out, condemned, and unusable. An engineer estimated the cost of re-

placement at $433,810. There was a balance of only $9,126.11 in the bridge fund. There was a total balance in the funds for road districts of $17,704.67. There was a federal matching fund of $66,496.48 of which $45,350 was already committed. It is not contended that any portion of the federal matching fund could be used for the purpose of carrying into effect the construction of this bridge or the improvement of this road.

It is further pointed out in the record that the electorate of the county in 1950 and 1952 defeated a proposal to increase the bridge levy which would have produced additional funds for the construction and reconstruction of bridges.

From this it becomes clear that there was not sufficient money available to take care of the needs of the county in this area.

In the light of all of these considerations it may not be said that the county commissioners abused their discretion by their refusal to build the bridge and to maintain this mile of highway. The writ of mandamus was properly denied.

The judgment of the district court is affirmed.

AFFIRMED.

THOMAS MARKEY, A MINOR, BY NOLA K. HENRY, HIS MOTHER AND NEXT FRIEND, APPELLANT, V. BOB HUNTER ET AL., APPELLEES.

103 N. W. 2d 221

Filed May 20, 1960. No. 34679.

1. **Evidence.** A photograph is properly admissible as evidence if it be shown that it is a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry.
2. **Evidence: Appeal and Error.** The admission of a photograph in evidence, which merely demonstrates the correctness of undisputed oral testimony already before the court, does not ordinarily constitute prejudicial error.

3. **Appeal and Error.** Errors in instructions not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct.
4. **New Trial: Appeal and Error.** A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown.
5. **New Trial.** To support a motion for new trial the newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Rice & Adams, Schrempp & Lathrop, Henry C. Rosenthal, Jr., and *Simon J. Albracht,* for appellant.

Morris J. Bruckner and *Cassem, Tierney, Adams & Henatsch,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for damages for injuries sustained in a motor vehicle accident. The action was brought by Thomas Markey, a minor, by his next friend, against Bob Hunter, the owner of a truck involved in the collision, and Glen W. Miller, the driver of the truck. The jury returned a verdict for the defendants and plaintiff has appealed.

The accident occurred on Highway Nos. 73-75 a short distance north of the Platte River bridge in Sarpy County on June 8, 1956, at about 4 p. m. The pavement was dry and visibility was good. Plaintiff and Wendall Schoening were riding in a coupé automobile as guests of Joel White, the operator of the car. Plaintiff was sitting between the driver and Schoening. As the car proceeded north on the highway they were preceded by the Hunter truck operated by Miller and an automobile operated by one Stevens. Immediately behind the

White car was one driven by one Jacobson. The collision occurred at a point where a private road branches off the highway to the west into the works of the Lyman-Richey Sand & Gravel Company. The driver of the truck approached the intersecting private road with the intention of turning left across the highway into the private road.

The driver of the truck testified that as he approached the private road he slowed down and gave a left-turn signal, and at a time when he had practically cleared the highway the rear end of his truck was struck by the car in which plaintiff was riding. The evidence further shows that before the truck made the left turn it was passed by the Stevens car and the Jacobson car. The White car followed the Jacobson car and when its driver saw the truck some 40 or 50 feet from him, he applied his brakes and swerved back to the right in an attempt to avoid the collision. White testified that he saw no left-turn signal by the driver of the truck and asserted that no such signal was given. It is not contended that the issue of negligence was not one for the jury.

Plaintiff contends that the trial court erred prejudicially in admitting certain photographs in evidence. The photographs were those of the truck taken long subsequent to the accident in which the driver of the truck at the time of the accident sat behind the wheel with his left arm horizontally extended. Its purpose was to demonstrate the visibility of the arm signal beyond the body of the truck from the front and from the rear as testified to by defendants' witnesses.

It is contended by the plaintiff that photographs which constitute a reenactment or illustration of one party's theory of the case are not admissible in evidence over proper objection and that their reception in evidence constitutes prejudicial error. In support of his contention plaintiff cites Massey v. Ivester, 168 Okl. 464, 33 P. 2d 765, and Wyldes v. Patterson, 31 N. D.

282, 153 N. W. 630, which hold in substance that photographs must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy; and that photographs taken to show more than this with men in various assumed positions and things in various assumed situations, intended only to illustrate hypothetical conclusions and to explain certain theories of the parties, are incompetent. Conceding the validity of plaintiff's authorities for the purposes of this case, they have no application to the situation before us. The purpose of the photographs in question was to demonstrate that the extended left arm of the driver, if so extended, was visible from the front and rear of the truck involved in the accident. They did not purport to demonstrate anything that occurred at the time of the accident, nor did they purport to show the movement of animate objects at the time of the accident. The photographs were nothing more than an attempt to meet the issue raised by the plaintiff that defendant was negligent in operating upon the highway a truck which was defective in that the box of said truck protruded beyond the cab to such an extent as to impair the visibility of a hand-and-arm signal given by the driver.

We point out that the photographs demonstrated only that the horizontal extension of the left arm of the driver of the truck was visible from the front and rear of the truck, as testified to by defendants' witnesses. The question of whether or not an adequate arm signal was given remained a question for the jury. The admissibility of the photographs falls within the rule announced in Zancanella v. Omaha & C. B. St. Ry. Co., 93 Neb. 774, 142 N. W. 190, which holds that the admission of such evidence is largely within the discretion of the trial court, depending upon the circumstances and the condition of the evidence. See, also, Patras v. Waldbaum, *ante* p. 20, 101 N. W. 2d 465; Bedford v. Herman, 158 Neb. 400, 63 N. W. 2d 772. Some

contention is made that the foundation was insufficient in that the location of the camera with relation to the truck was not adequately shown. We find no abuse of discretion by the trial court in this respect. We find nothing in the record to indicate an abuse of discretion on the part of the trial court in admitting the questioned photographs in evidence.

Plaintiff contends that instructions Nos. 6 and 7 were in conflict and were prejudicial for that reason. Instruction No. 6 informed the jury of the necessity under the applicable statute of giving an appropriate signal of the intention to make a right or left turn by hand and arm or signal device, but when a hand-and-arm signal would not be visible both to the front and rear, the signal must be given by lamp or signal device from the left side of the vehicle. By instruction No. 7 the court informed the jury that a vehicle assembled prior to January 1, 1954, is not required to be equipped with automatic turn signals, and that defendants' truck having been assembled prior to such date was not required to be equipped with automatic turn signals. While it would have been better, in view of the evidence, not to have included that part of instruction No. 6 dealing with hand-and-arm signals when the construction of the vehicle prevents them from being seen, we fail to see how the jury was prejudiced thereby. The faulty part of instruction No. 6 had no application to the issues in the case under the evidence, a conclusion that was readily apparent to the jury. The evidence that a hand-and-arm signal could be seen if the arm was horizontally extended was not disputed. It is fundamental that errors in instructions which are not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct. Becker v. Hasebroock, 157 Neb. 353, 59 N. W. 2d 560; Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281.

The plaintiff asserts that the trial court erred in overruling plaintiff's motion for a new trial on the ground

of newly discovered evidence, the newly discovered evidence being that the truck appearing in the photographs offered in evidence at the trial was not the truck involved in the accident. A hearing was had on the motion for a new trial at which the evidence of a number of witnesses was taken. Plaintiff relied on the registration certificates of the truck and the affidavit of the mechanic who repaired the truck to establish his assertion.

The evidence does show that proper registration certificates and plates were not placed on the truck involved in the accident. Several witnesses positively identified the truck as the one that participated in the accident. The mechanic who repaired the truck after the accident testified that he became confused at the time he gave his affidavit because of the mix-up in license plates. He positively identified the truck in the photographs as the one in the collision of June 8, 1956, which he had repaired. While it was established at the hearing on the motion for a new trial that improper registration certificates and license plates had been placed on the truck, the evidence clearly established that the truck in the photographs was the truck that participated in the accident.

The alleged new evidence was not of such a nature that if offered and admitted at the trial it would probably have produced a substantial difference in the result. In fact, the evidence on the motion for a new trial was almost conclusive that the truck shown in the photographs offered at the trial was the truck with which the car in which plaintiff was riding collided.

It is a fundamental rule that an application for a new trial upon the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown. Reinsch v. Pacific Mut. Life Ins. Co., 140 Neb. 225, 299 N. W. 632; Finnern v. Bruner, *ante* p. 170, 101 N. W. 2d 905. The trial court

was correct in overruling the motion for a new trial on the ground of newly discovered evidence.

The judgment of the district court being free from prejudicial error is affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. EARL F. ALBERT ET AL., APPELLANTS.
103 N. W. 2d 277

Filed May 20, 1960. No. 34685.

1. **Trial: Appeal and Error.** Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof.
2. **Appeal and Error.** Before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made.

APPEAL from the district court for Cass County: JOHN M. DIERKS, JUDGE. *Affirmed.*

Francis M. Casey, for appellants.

Clarence S. Beck, Attorney General, and *Harold S. Salter,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in condemnation. The State of Nebraska, Department of Roads, plaintiff, appealed from an appraiser's award to the district court for Cass County. The case was tried to a jury resulting in a verdict for the defendants. The defendants filed a motion for new trial which was overruled. Defendants perfected appeal to this court.

The defendants assign as error that: (1) The trial

court erred in giving on its own motion an admonition to the jury; and (2) the trial court erred in failing to properly instruct the jury as to the law applicable in the case.

The record shows: "BY THE COURT: Then, for the record here, it is further agreed that at the conclusion of opening statements the jury be permitted to view the premises in a body in charge of the bailiff, and that counsel may go in a car separate from any of the jurors for the purpose of making sure that they get to the right location and view the proper premises involved." Counsel for the parties agreed to what the trial court stated above.

"BY THE COURT: * * * The next order of procedure, Ladies and Gentlemen, will be the opening statements of counsel, by which they are privileged to outline to you a little more in detail the nature of the case and the evidence by which they expect to maintain their respective positions. * * * Opening statements of counsel having been concluded, it has now been agreed by them that before introducing evidence the jury be privileged to view the premises involved, where this controversy arises; and in order to do that it will be necessary for you to go to the site. Everyone doesn't need to take their individual car; you will be in the charge of the bailiff, Mr. Beckman, he has his car, and three or four of you can ride with him; two other cars would be sufficient among the jurors. Are there two of you who have cars available that can take them? Mr. Norris, you have one, and Mr. Resso. The three of you, then, Mr. Norris, Mr. Resso and Mr. Beckman, the bailiff, can take cars, and the jury will be escorted under the direction of the bailiff in a body, and Mr. Crosby and Mr. Salter will go in a separate car; and you can follow them out there, Mr. Beckman, so you know you are getting to the right location. They are not going out for the purpose of answering questions or arguing their case out at the site at all, they are just going to make sure you

look at the right place, that's all, and any inquiries that you have concerning the matter, direct them to the bailiff and he in turn will endeavor to pass them on to counsel, and if they can give you an answer by agreement, all well and good; you are out there for the purpose of viewing and getting your feet on the ground as to the place that the evidence is going to be about here this afternoon, and it will be a little bit better for you if you can visualize what is being discussed and talked about, rather than having witnesses just describe it."

The defendants argue that the jury was permitted to view the premises prior to the introduction of testimony in court; that the trial court failed, in its admonition, to advise the jury that what it was to view could be considered as evidence; that the jury was limited in the view as to the exact location on the land; that the law is clear that the view of the premises is not for the purpose of knowing the location so as to better follow the evidence, but is evidence in and of itself to be considered along with other evidence in the case in arriving at a verdict; and that the court started the admonition to the jury, "Before introducing evidence" the jury would be permitted to view the premises.

In this connection the defendants cite Chicago, R. I. & P. Ry. Co. v. Farwell, 60 Neb. 322, 83 N. W. 71, wherein the following was quoted from Peoria Gas Light & Coke Co. v. Peoria Terminal Ry. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373: "It has been frequently held by this court that the results of the personal view of the premises by the jury in condemnation cases are in the nature of evidence, and may be taken into consideration by them in passing upon the testimony of the witnesses; and that where the evidence is conflicting, they may be resorted to by the jury as bearing upon the weight to be given to the variant and conflicting estimates given by the various witnesses, so that, if the verdict of the jury is supported by the evidence,

it will not be disturbed simply because it is contrary to what appears to be the preponderance of the testimony."

The defendants also cite Stull v. Department of Roads & Irrigation, 129 Neb. 822, 263 N. W. 148, as follows: "This court is committed to the rule that the viewing of the premises involved in litigation by the jury is evidence, and not merely a means of enabling the jury better to construe and apply the evidence adduced in court."

In applying the above rule as stated in Stull v. Department of Roads & Irrigation, *supra,* the defendants assert that in the admonition by the court before viewing the premises, the jurors were not advised that what they were to view was evidence, but were told, or led to believe, that it was a means of enabling them to better construe or understand the evidence.

The defendants quote a part of instruction No. 10, as follows: "In determining any of the questions of fact presented in this case, the jury should be governed solely by the evidence introduced before them. * * * if a juror be personally acquainted with any particular fact or facts not supported by the evidence, such juror is not permitted to take his or her personal knowledge of such fact or facts into consideration or to mention the same to the other jurors."

The defendants contend that instruction No. 10 failed to state or to define (1) the evidence the jury viewed on the scene; (2) the application of the jurors' general knowledge of that evidence; and (3) that what they viewed at the scene was evidence the same as the testimony adduced before them.

Instruction No. 6 reads as follows: "Pursuant to stipulation of the parties you have been permitted to view the premises in controversy. Such view may be considered by you along with all the other evidence in the case, and it is proper for you to take into account the results of your observations and to consider the

same, in connection with all the other evidence, in arriving at your verdict."

The defendants' contention is that the trial court, in instruction No. 6, did not advise the jurors that their view of the premises was evidence.

Instruction No. 9 dealt with what constitutes preponderance of the evidence. The defendants complain of this instruction on the ground that it did not advise the jury that the evidence adduced by viewing the premises could be taken into consideration in determining the credibility of the witnesses.

As we view the assignments of error raised on this appeal, the substitution of the word "evidence" for "testimony" was of little consequence. The following is applicable.

In Carlson v. Hanson, 166 Neb. 96, 88 N. W. 2d 140, this court held: "Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof." This rule of law has been pronounced several times by this court in cases too numerous to cite.

Assuming that there was error as contended for by the defendants, it was harmless error. As was said in Wolfe v. Mendel, 165 Neb. 16, 84 N. W. 2d 109: "The rule is that before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made. Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N. W. 2d 466."

We fail to find prejudicial error in the record, as contended for by the defendants.

For the reasons given herein, the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES A. FISHER, RESPONDENT.

103 N. W. 2d 325

Filed May 27, 1960. No. 34625.

1. **Attorney and Client.** The duty rests on this Court to maintain the integrity of the legal profession by disciplining lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt and defeat the administration of justice. We therefore review the evidence adduced in such proceedings de novo to determine if discipline should be imposed and, if it should, the extent thereof. In our discretion we may adopt the findings and recommendations of the referee if the evidence adduced, based on the principles applicable thereto, so justifies.
2. ———. Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto. However, in such proceedings the presumption of innocence applies and the charge made against an attorney must be established by a clear preponderance of the evidence. That is, the Court should be satisfied to a reasonable certainty that the charges are true.
3. ———. A complaint against an attorney should set forth the grounds upon which discipline is sought with reasonable definiteness, that is, with sufficient definiteness so the Court may be advised of the matters complained of and the attorney fully informed of the matters with which he is charged so as to enable him to prepare and present his defense thereto.
4. ———. If the charges made against an attorney constitute a crime the fact that he has neither been charged therewith nor convicted thereof is immaterial in a disciplinary proceeding.
5. ———. In a disciplinary proceeding only those matters which are specifically charged in the complaint can be considered.
6. ———. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
7. ———. An attorney, as an officer of this Court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the Court.
8. ———. The ethical standards relating to the practice of the law in this state are the Canons of Professional Ethics of the Ameri-

can Bar Association which have been or may be, from time to time, approved by the Supreme Court.

9. ———. Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment.

10. ———. Whether or not the reputation of an attorney is of material importance in any discipline case must necessarily depend largely upon the facts and circumstances thereof.

Original action. *Judgment of suspension.*

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas,* for relator.

William A. Stewart, Sr., Bevin B. Bump, and *Charles A. Fisher,* for respondent.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on the relation of the Nebraska State Bar Association against the respondent, Charles A. Fisher. See Part III, Rule 2, Disciplinary Proceedings of the Revised Rules of the Supreme Court.

The complaint charges that: "On June 15, 1954, the respondent, while serving as counsel for the defendant Loyd Carroll Grandsinger, who was then and there being prosecuted for murder in the first degree, in the case of State of Nebraska vs. Loyd Carroll Grandsinger, then pending in the District Court of Cherry County, Nebraska, and while engaged in the trial of said cause in said court, did knowingly and contemptuously pick up a leather belt, which had been introduced in evidence and identified as Exhibit 10 in said proceeding, which leather belt contained a hole, and which exhibit was vital material evidence in the cause then being tried, and did, then and there, knowingly and contemptuously force the end of a wooden tapered dowel through

the hole in said belt in such manner as to increase the size of the hole and thereby to damage the probative value of said exhibit." The complaint then goes on to state: "That the acts herein set forth constitute unprofessional conduct by the respondent as a member of the Nebraska State Bar; constitute a violation of his oath of office as an attorney; constitute a violation of Section 7-105 R. R. S. of Nebraska, 1943, which makes it the duty of an attorney to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; constitute a violation of Section 7-106, R. R. S. of Nebraska, 1943, relating to an attorney who is guilty of deceit with intent to deceive a court; constitute a violation of Section 28-737 R. R. S. of Nebraska, 1943, relating to the offense of corruptly endeavoring to obstruct or impede the due administration of justice; constitute a violation of Section 28-711, R. R. S. of Nebraska, 1943, relating to the altering of any record pertaining to any court; constitute a violation of Canon 15, Canon 22, and Canon 32 of the Canons of Professional Ethics of the American Bar Association as approved by the Nebraska Supreme Court."

Respondent filed an answer to the complaint. We thereupon appointed a referee to take testimony and make a report to this Court. The referee had a hearing, took testimony, and made a report. Therein he set forth his findings of fact and recommendations as to the discipline he thought should be imposed. This was proper procedure for the referee to follow for Rule 7 of our Rules of Disciplinary Proceedings provides, in part, that: "The referee shall make a written report stating his findings of fact and recommendations."

Exceptions were taken by respondent to both the referee's findings of fact and recommendations as to discipline while the relator took exception only to the latter. Since the duty rests on this Court to maintain the integrity of the legal profession by disciplining

lawyers who indulge in practices designed to bring the courts or the profession into disrepute, or to perpetrate fraud on the courts, or to corrupt and defeat the administration of justice, we necessarily review the evidence adduced in such proceedings de novo to determine if discipline should be imposed and, if it should, the extent thereof. In our discretion we may adopt the findings and recommendations of the referee if the evidence adduced, based on the principles applicable thereto, so justifies. See, State ex rel. Nebraska State Bar Assn. v. Gudmundsen, 145 Neb. 324, 16 N. W. 2d 474; State ex rel. Nebraska State Bar Assn. v. Richards, 165 Neb. 80, 84 N. W. 2d 136; In re Veach, 365 Mo. 776, 287 S. W. 2d 753.

In view of respondent's contentions we think it necessary to set forth certain principles which are applicable in disciplinary proceedings.

Disbarment proceedings are essentially civil and not criminal in character and the recognized rules governing civil practice are applicable thereto. However, in such proceedings the presumption of innocence applies and the charge made against an attorney must be established by a clear preponderance of the evidence. That is, the court should be satisfied to a reasonable certainty that the charges are true. See, Part III, Rule 1, Disciplinary Proceedings of the Revised Rules of the Supreme Court; State ex rel. Nebraska State Bar Assn. v. Price, 144 Neb. 542, 13 N. W. 2d 714; State ex rel. Nebraska State Bar Assn. v. Gudmundsen, *supra;* State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

A complaint against an attorney should set forth the grounds upon which discipline is sought with reasonable definiteness, that is, with sufficient definiteness so the Court may be advised of the matters complained of and the attorney fully informed of the matters with which he is charged so as to enable him to prepare and present his defense thereto. See, Part III, Rule 3, Disciplinary Proceedings of the Revised Rules of the Su-

preme Court; Braverman v. Bar Assn. of Baltimore City, 209 Md. 328, 121 A. 2d 473, certiorari denied, 352 U. S. 830, 77 S. Ct. 44, 1 L. Ed. 2d 51; 5 Am. Jur., Attorneys at Law, § 291, p. 437; 7 C. J. S., Attorney and Client, § 31a, p. 776. If the charges made against an attorney constitute a crime the fact that he has neither been charged therewith nor convicted thereof is immaterial in a disciplinary proceeding. See State ex rel. Nebraska State Bar Assn. v. Butterfield, 169 Neb. 119, 98 N. W. 2d 714.

In a disciplinary proceeding only those matters which are specifically charged in the complaint can be considered. See, Article XI, section 7, of the Rules Creating, Controlling and Regulating Nebraska State Bar Association; State ex rel. Nebraska State Bar Assn. v. Price, *supra.*

Respondent was admitted to practice law in this state on June 4, 1927. Immediately following his admission he began the practice of his chosen profession at Chadron, Dawes County, Nebraska, and has been practicing there ever since. He is presently a member of the Nebraska State Bar Association and licensed to practice law anywhere in the state.

We have often said: "In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts." State ex rel. Attorney General v. Burr, 19 Neb. 593, 28 N. W. 261. See, also, State v. Fisher, 103 Neb. 736, 174 N. W. 320; State ex rel. Nebraska State Bar Assn. v. Wiebusch, 153 Neb. 583, 45 N. W. 2d 583; State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

"An attorney, as an officer of this court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the court." State ex rel. Sorensen v. Goldman, 127 Neb. 340, 255 N. W.

32. See, also, State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra;* State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

"Section 7-104, R. R. S. 1943, provides the oath every person must take and subscribe upon being admitted to practice by this court. In State ex rel. Nebraska State Bar Assn. v. Wiebusch, *supra,* we said: 'Such an oath requires lawyers to faithfully discharge their duties, uphold and obey the Constitution and laws of this state, observe established standards and codes of professional ethics and honor, maintain the respect due to courts of justice, and abstain from all offensive practices which cast reproach on the courts and the bar.'" State ex rel. Nebraska State Bar Assn. v. Richards, *supra.*

The act with which respondent is here charged occurred while he, in association with William C. Heelan, now deceased, was acting as counsel for Loyd Carroll Grandsinger in the district court for Cherry County. Grandsinger had been charged therein with the murder of Marvin Hansen, a member of the Nebraska Safety Patrol. Respondent, in association with Heelan, was helping conduct his defense. The charge was being prosecuted by William B. Quigley, County Attorney of Cherry County, assisted by Rush C. Clarke, who had been appointed for that purpose by the court. See Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632. During the course of the trial, which lasted from June 4 through 16, 1954, a Sam Browne belt and a pants belt worn by Marvin Hansen at the time he was killed were introduced in evidence. Both belts contained holes in them. There was evidence to the effect that these holes had been caused by a .22 caliber bullet passing through them. That fact, if true, was very material to the State's case. In fact, as to the pants belt, the judge admonished the jury to "Just examine the hole and do not probe it with anything." In connection with the Sam Browne belt, Lieutenant Wayne Byler of the Nebraska Safety Patrol was asked to take a dowel and make a

test thereon. Respondent objected to his doing so on the basis that it would alter the exhibit. Before the court ruled on this objection Byler was asked: "Can that (the test) be done without altering the exhibit?" He replied thereto: "No, I am afraid not." He was then asked: "In what way would it alter it?" He replied: "I think it would make the hole larger." The court thereupon sustained respondent's objection. It thus becomes evident that respondent was aware of the importance and materiality of the holes in these exhibits and the effect that probing them with a dowel would have.

Both the State and defense rested their case in the murder trial on Monday, June 14, 1954. Thereupon, a recess was taken until 9 a.m., Tuesday, June 15, 1954. The incident complained of happened shortly before 9 a.m., on Tuesday in the district courtroom, but before court had reconvened. There were present in the courtroom at that time, insofar as here material, the official court reporter, the county attorney, and respondent. The jury had not been called and was not present although there were others in the courtroom. The trial judge, Clarke, and Heelan were in the judge's chambers, which is adjacent to and just to the west of the south part of the west wall of the courtroom. The official court reporter had removed the exhibits from the judge's chambers onto his desk. While the reporter and the county attorney were moving them from that desk to a table in front of the jury box respondent was standing at the northeast corner of the reporter's desk. The evidence shows that respondent, while standing there, picked up the pants belt and a wooden dowel, exhibits in the case, from the reporter's desk and intentionally inserted the dowel in the bullet hole in the belt, twisting it while doing so. The county attorney caught respondent in the act.

The county attorney testified he turned very suddenly to catch respondent in the act of forcibly inserting

the dowel into the bullet hole in the pants belt; that he observed the respondent's face at the time and it was set with a determined expression; and that he grabbed respondent by the left arm and immediately took him into the judge's chambers where he admitted to the trial judge what he had done.

Clarke, who was in the judge's chambers at the time with the trial judge and Heelan, testified that the county attorney entered the judge's chambers with respondent, whom he was holding by the left arm; that respondent was holding a belt, one of the exhibits in the murder case, in his left hand and wooden dowel in his right; and that the dowel was still inserted in the bullet hole in the belt.

Sometime later that morning court reconvened and the record shows the following took place in the presence of the jury:

"BY MR. CLARKE:

Before we proceed with the arguments, Your Honor, there is a matter that has been taken up with, Your Honor, which we wish to get into the record.

THE COURT: Very well.

MR. CLARKE: We wish the record to show that counsel for the defendant, is willing that it shall show, that this mrongin (morning) in this court room, after the court reporter had brought all the exhibits in the case out and laid them on the reporter's desk, Mr. Fisher, one of counsel for the defendant, while he was examining Exhibit No. 10, being the leather pants belt heretofore identified as the belt of Marvin Hansen, and that at that time he took a dowel, being one of the wooden dowels on the reporter's desk, and being either the same or one exactly like the one I am holding in my hand, which I will have to have marked as an exhibit, and pushed it violently—

MR. FISHER: (Interrupting) I didn't violently push it—

MR. CLARKE: (Interrupting) pushed it through the hole in the belt hard enough so that it materially en-

larged the size of the hole to an extent which cannot now be determined and that the belt, Exhibit No. 10, is not now in the same condition as it was when it was offered in evidence and received in evidence, and that the hole is now materially larger than it was before Mr. Fisher did that.

* * *

THE COURT: Mr. Fisher, as I understand it you have told counsel that you did that?

MR. FISHER: Yes.

THE COURT: You recognize that the hole is larger?

MR. FISHER: Yes."

Section 7-105, R. R. S. 1943, provides in part as follows: "It is the duty of an attorney and counselor: (1) To maintain the respect due to the courts of justice and to judicial officers; * * * (3) to employ, for the purpose of maintaining the cause confided to him, such means only as are consistent with the truth; * * * (5) to abstain from all offensive practices * * *."

Section 7-106, R. R. S. 1943, provides in part as follows: "An attorney and counselor who is guilty of deceit or collusion, * * * with intent to deceive a court, or judge, * * * is liable to be disbarred, * * *."

"The ethical standards relating to the practice of the law in this state are the canons of Professional Ethics of the American Bar Association and those which may, from time to time, be approved by the Supreme Court." State ex rel. Nebraska State Bar Assn. v. Richards, *supra*. See, also, Article X of the Rules Creating, Controlling and Regulating Nebraska State Bar Association; State ex rel. Nebraska State Bar Assn. v. Fitzgerald, 165 Neb. 212, 85 N. W. 2d 323.

Canon 15 provides in part: "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane."

Canon 22 provides in part: "The conduct of the

lawyer before the Court and with other lawyers should be characterized by candor and fairness."

Canon 32 provides in part: "He must also observe * * * the statute law, * * *."

"Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment." State ex rel. Nebraska State Bar Assn. v. Richards, *supra*.

Respondent seeks to explain and justify what he did by testifying as follows: "A. I was trying to probe it to see if there was any possible thing in the hole. I may explain that the slug had never been found—this .22 slug." When asked: "And you at that time thought the slug might have still been in the belt?" He replied: "I thought if it was their theory was blown clear out of the building."

Considering the thickness of the pants belt involved and the size of the bullet of a .22 caliber short, let alone that of a .22 caliber long rifle cartridge which was the type of ammunition used, this explanation is neither realistic nor plausible.

Respondent calls our attention to the condition of the hole in the belt now, over 5 years later, to show what he did did not materially alter or change the condition of the hole in the pants belt and offered evidence to the effect. Assuming that is true it is no excuse for what respondent did or attempted to do. The mere fact that he was caught before he completed what he set out to do is no excuse.

Respondent has offered a large number of affidavits by persons who have known him for many years. These are generally to the effect that he has always had a good reputation in Chadron and the surrounding territory both as a lawyer and as a citizen. We said in State ex rel. Nebraska State Bar Assn. v. Butterfield, *supra*: "Whether or not the reputation of an attorney is of material importance in any discipline case must neces-

sarily depend largely upon the facts and circumstances thereof." As we said in State ex rel. Nebraska State Bar Assn. v. Richards, *supra:* "* * * we think this evidence of his reputation and integrity as a lawyer in a community where he has practiced law for many years should be given consideration in determining the extent of discipline that should be imposed." See, also, State ex rel. Nebraska State Bar Assn. v. Gudmundsen, *supra.*

Respondent had been actively engaged in the practice of law for 27 years when the incident occurred of which we here find him guilty. He had a large practice and should have been and was fully aware of the Canons of Professional Ethics which controlled his conduct while so engaged. In view of the facts herein set forth, and all the circumstances disclosed by the record relating thereto, we find the ends of justice will be properly served by suspending respondent from the further practice of law, the same to go into effect 30 days after our judgment rendered herein becomes effective. If, at the end of 1 year from the effective date of his suspension, respondent makes an affirmative showing sufficient to satisfy this Court that he has fully complied with our order of suspension and that he will not, in the future, engage in any practices offensive to the legal profession then he will be reinstated and allowed to engage in the practice of law. However, if he fails to do so within a reasonable time thereafter then the suspension herein provided for shall become permanent.

Judgment of suspension accordingly. All costs of this proceeding are taxed to the respondent.

JUDGMENT OF SUSPENSION.

LUTHER WESLEY WILSON, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
103 N. W. 2d 258

Filed May 27, 1960. No. 34754.

1. **Criminal Law.** This court will not in a case of the character of the present one resolve conflicts in or weigh evidence or pass upon the credibility of witnesses.
2. ———. It is implicit in a verdict of guilty in such a case that the jury decided all controverted questions of fact unfavorably to the accused and this court will not disturb the verdict if it is based upon evidence unless, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt.
3. **Homicide.** Homicide in the perpetration or attempt to perpetrate a robbery is a separate offense distinguished from ordinary first-degree murder and in a prosecution for such an offense proof is not required of premeditation, deliberation, or a purpose to kill.
4. ———. The turpitude involved in a robbery takes the place of deliberate, premeditated malice and the purpose to kill is conclusively presumed from the criminal intention required for robbery.
5. **Robbery.** An individual attempts to perpetrate a robbery when he forcibly by violence or by putting in fear attempts to take from another or from his immediate possession or custody any money or personal property of value with intent to rob or steal.
6. **Criminal Law: Evidence.** If the corpus delicti is proved, an unsupported, extrajudicial admission may be sufficient to establish connection of the accused with the crime charged.
7. **Evidence.** Evidence tending to show that a person made, before becoming a witness in a case, statements inconsistent with and contrary to his testimony as a witness on the trial thereof, does not dispose of his testimony as to the matters involved but it continues to be a part of the evidence in the case to be weighed and considered in the determination thereof.
8. ———. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness.
9. **Criminal Law: Evidence.** A showing of all that occurred immediately before and at the time of the making of a confession is sufficient foundation for its admission if such proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements and threats.

10. **Criminal Law.** To constitute one an accomplice he must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough to constitute one an accomplice, and knowledge that a crime is being or about to be committed does not constitute one an accomplice.
11. ———. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief of the guilt of a defendant; but if such belief is expressed as a deduction from the evidence, it is not improper.
12. ———. It is permissible for the prosecutor to refer to the defendant in a case such as the present one as a bandit, a robber, and a murderer when such conclusions are reasonable and legitimate deductions drawn from the evidence.
13. ———. If no objection is made to alleged improper conduct of opposing counsel in his argument to the jury at the time of the making thereof, there can be no prejudicial error predicated upon the alleged misconduct.
14. **Evidence.** A litigant surprised or misled by the adverse testimony of his own witness may show that the witness had made a prior statement inconsistent with and contradictory of his testimony; but before this is permitted, if proper objection is interposed by an adverse party, the court should be satisfied that the party producing the witness was actually taken by surprise or was misled and that the testimony is contrary to what he had just cause to expect from the witness based upon his prior statement.
15. ———. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made.
16. **Homicide.** The duty of a jury in a case of this character is to ascertain the guilt or innocence of the accused; and if its verdict is guilty, to determine the penalty as the law provides. The decision of the jury should not be influenced by or rest upon the fact of whether a parole, pardon, or other clemency is easy or difficult to secure.

ERROR to the district court for Douglas County: PATRICK W. LYNCH, JUDGE. *Affirmed.*

Joseph M. Lovely, Edward T. Hayes, and *Adolph Q. Wolfe,* for plaintiff in error.

Clarence S. Beck, Attorney General, and *Cecil S. Brubaker,* for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Luther Wesley Wilson, plaintiff in error referred to herein as the accused, was charged with and convicted of the crime of murder while in the perpetration of or an attempt to perpetrate a robbery. The sentence was death. He prosecutes this error proceeding to review the record of the trial and his conviction.

Raymond Rasmussen was, in the presence of two eyewitnesses, assassinated by a pistol shot in the right side of his head at about 9:30 p. m., February 28, 1958, while he was on duty in the place of business of his employer in the city of Omaha by a man who was attempting to perpetrate a robbery of the place of business. The accused was charged with the commission of the crime. The place of the tragedy was in a self-serve retail store which sold groceries and liquors located at Thirtieth Street just south of Lake Street in Omaha variously referred to in the record as Aronson's Liquor Market, Aronson's Market, and the Fisher Liquor Store sometimes known as Aronson's. A witness explained it was formerly Aronson's Liquor store but that it was Fisher's Liquor store. It will be identified herein as the market.

The front of the market was to the west on Thirtieth Street and the public or customer entrance thereto was on the west about equidistant from the north and south ends of the building occupied by it. The building was about 24 feet from east to west and about 48 feet from north to south. There was a counter with a cash register on it about 10 feet due east from the entrance to the market and there was a display case immediately adja-

cent to the counter extended from it a distance to the north of 10 feet. Another display case was adjacent to the counter and extended 16 feet from it towards the south. There was a television set on quite a high base facing northwest about 10 feet southeast of the counter. It was operating at the time of the attempted robbery televising a Friday night boxing contest which commenced at 9 p. m., and was then in the seventh round of the contest. Raymond Rasmussen, an employee of the market and the victim of the tragedy, named herein as Rasmussen, was immediately east of the counter and slightly south of the cash register thereon which occupied the center of the counter from north to south and was near the east edge of it. Hugh O'Grady, an employee of the market, hereafter mentioned as O'Grady, was also immediately east of the counter and a short distance north of the cash register. Lester Wells, designated as Wells herein, a lad past 15 years but less than 16 years of age, a student in the ninth grade at Technical High School in Omaha, who was a newspaper carrier and who frequently stopped at the market after he had finished the distribution of papers on his route, was west of but near the counter slightly south of the cash register thereon. He had a comic book which he had been reading and he also was watching the television display of the boxing contest. The two employees above named and Wells were the only persons in the store. The employees were each facing the television and watching the boxing contest thereon and Wells was facing east reading a book when the person who perpetrated the crime entered the market. The area surrounding and the interior of the market were well lighted.

Marvin Dilwood, hereafter designated Dilwood, 16 years of age, a nephew of accused, went to his house about 1 p. m., on February 28, 1958. The only persons who were there were Dilwood and the accused and they remained there until 7:30 or 8 p. m., when they left and walked north on Twenty-ninth Street to Blondo

Street and about one-half block east on Blondo Street to the home of a sister of the accused, a distance of about 7 blocks. The accused had a bundle which he carried under one of his arms and did not take it in the house of his sister when he and Dilwood entered it. It was about 8 o'clock when they got there. There were several persons at the home including Frances Johnson, another sister of accused; her boy friend, George Battles; and Grill Jones. They were drinking. Dilwood and accused left there after about 1 hour or near 9 o'clock. The accused took with him a bundle. They walked west on Blondo Street to Twenty-ninth Street and north on the west side thereof to Erskine Street, a distance of almost 3 blocks, and when they were nearly there accused told Dilwood "in a round-about-way" that he, the accused, was going to hold up Aronson's. Accused took off the coat he was wearing, took another coat from the bundle he had been carrying, and put it on. The coat he took off he placed in a hedge which surrounded a house at Twenty-ninth and Erskine Streets. When accused talked of Aronson's, that he was going to hold it up and he started to change his coat, Dilwood walked west across Thirtieth Street, climbed a retaining wall, and reached a sidewalk on the west side of Thirtieth Street which served the occupants of houses referred to as "the Projects." They were one story in height and faced east. The market, which faced west on Thirtieth Street, was in front of the sidewalk that served the projects where Dilwood stood. Dilwood was familiar with the market and had been there many times prior to February 28, 1958.

Dilwood saw accused change his coat and hide behind the wall which extends north and south near Thirtieth Street. He was standing and Dilwood could see his arms. Dilwood watched accused for a short time and then saw him get over the wall and in a crouched-down position run into the front or entrance door of the market. Dilwood heard a noise he described as a "pop like

a pop bottle." Accused ran out of the market south on the east side of Thirtieth Street and then east on Erskine Street. He was in the market only a short time, estimated by Dilwood as not more than 5 or 6 seconds. Dilwood remained where he was until he saw persons coming to the market when he crossed Thirtieth Street to learn what had happened and then he returned to the house of his aunt at 2821 Blondo Street which he and accused had visited and left earlier in the evening. When he got there accused was at that location. There was a party there that night from 7:30 or 8 p. m. until almost 1 a. m. the following morning which was March 1, 1958. It was referred to as a "get-together" and many persons attended, some without invitation. Dilwood remained there only 10 or 15 minutes. He was asked by accused to burn a coat which was on the front porch behind a divan. Dilwood left alone taking a bundle which he found behind the divan on the porch to his home at 3333 Ohio Street where he arrived about 10:30 p. m. He placed the bundle in the basement and a few days later burned it. He found inside the coat a white rubber mask with red on the cheek. It was not homemade. He said he first saw it while he was going home carrying the coat. The mask was burned with the coat. The coat was described as light tan gabardine. When accused entered the market Dilwood said he recognized Lester Wells, whom he had known all his life, standing therein in front of a counter and also one of the clerks employed in the market. When Dilwood saw accused go into the market the night of February 28, 1958, he, Dilwood, was standing near Thirtieth and Erskine Streets by a small tree shown in a picture in evidence. That location was identified as 2414 on Thirtieth Street. The address of the market was 2405 on Thirtieth Street. Dilwood was accordingly a short distance south of the market. He was sure of the identity of the accused as the man he saw and whose actions he described.

O'Grady and Rasmussen were on the evening of Febru-

ary 28, 1958, on duty in the market as clerks. They and Wells were the only persons in the market and they were in the positions relative to the counter on which the cash register was located as detailed above. Wells was facing the counter from the west, reading a comic book. The two clerks were facing the television with their backs to the northwest. O'Grady at approximately 9:30 p. m. noticed the front door open. He turned and faced the door. A man entered wearing a mask and carrying a revolver, sort of waving it, in his right hand about waist high. He came quickly right up to the counter and stated: "Hand over your money. This is a stick-up." Rasmussen had turned toward the west and somewhat to the north. He looked at the intruder and as he demanded the money Rasmussen said: "Are you kidding?" There was a shot and he went down on his hands and knees and came to rest on his stomach with his head towards the south. O'Grady fell to the floor and went north and east on the floor to the stairway which was the facility for passage to and from the basement. He went down the stairway to the basement. Wells got to the stairway and down in the basement preceding O'Grady. They took refuge there until the police came which was only a few minutes later. When O'Grady came from the basement Rasmussen had been removed from the market. O'Grady saw the intruder only a few seconds but he estimated that the intruder was about 6 feet tall, of medium build, wearing a knee-length coat, and had a raspy voice. There was nothing taken from the market so far as O'Grady knew or could determine. The cash register was closed when the holdupman came and it remained closed after he had gone.

The back of Wells was to the holdupman as he entered the market, and as he came toward the counter he shoved Wells to the south out of his way with his right hand in which he had a gun. He wore a mask which covered his face. Wells heard a shot and saw Rasmussen lean forward and fall east of the counter. The last

Wells saw of the intruder he was standing in the market.

William Wells soon after 9:35 p. m. on February 28, 1958, entered the market, selected what he desired, and put it on the counter where the cash register was located. He saw no one in the market when he entered. He waited for a short time and then said: "Where is everybody around here?" He got no response but he heard a noise on the east side of the counter. He discovered it was Rasmussen attempting to get up from the floor. He was partly successful and attempted to say something to William Wells but he could not understand it. Rasmussen then fell back with his head in a northerly direction. His face was bloody. William Wells called the police by telephone and he stayed in the market until the police arrived.

A member of the police department of Omaha examined the injured man on the floor of the market about 9:40 p. m. The policeman found a hole in the head of the injured man under his right ear from which blood was squirting. He was not dead at that time. The officer thought the injured man had been shot.

A member of the detective bureau of Omaha arrived at the market about 9:45 the evening of the tragedy. He found a man lying east of the service counter on the floor with blood coming from the right side of his face and apparently from a wound just below his right ear. The victim was still breathing. The officer spoke to him but got no response. His eyes were in a fixed position. Near the injured man there were two pools of blood of considerable size. The rescue squad arrived and the man who was Rasmussen was taken by ambulance to the Douglas County Hospital.

An autopsy was performed on the body of Rasmussen by a specialist in pathology. He found a circular wound on the body near the ear lobe just back of the angle of the jaw on the right side. He found there was no evidence of powder burns. He could not from an external examination determine that it was a gunshot wound

but it was his opinion and conclusion that it was an entrance and not an exit wound. He by further examination found that a bullet went into the neck, passed through the general area of the major vessels leading from the chest through the neck into the brain, passed just in back of the lower portion of the throat in a comparable area or to the left side, and ended just inside the angle of the left jawbone. The fact that the blood vessels were interrupted was indicated and established by the fact that there was extensive hemorrhaging and bleeding into virtually all of the surrounding tissues of the neck. He found a compression of the throat region which in effect essentially cut off breathing partially or completely. The lungs showed evidence of hyperinflation—that is, more air in the lungs than normally and this was indicative of air being able to get in but not out of the lungs. It was the opinion of the doctor that the death of the victim, Raymond Rasmussen, was caused by shock associated with hemorrhage and also associated with interference to breathe, that these factors combined to cause death, and that the factors were related to the gunshot wound he had previously described. The doctor recovered from the region of the left side of the neck immediately inside the angle of the jaw a copper-headed metal fragment which he presumed was a bullet. He removed it by incising a portion of the bone at the base of the skull and working the bullet out with his fingers keeping it from any contact with instruments. The doctor found that the gunshot caused extensive bleeding of the spurting type since the blood vessels cut by the bullet were relatively large ones. The victim had blood on the right side of his face, on the back part of his head, the upper part of his back, and on both hands.

The accused on October 24, 1958, admitted in the presence of Donald Knowles, deputy county attorney of Douglas County; John Gallagher, a police officer of Omaha; and Jack M. Fitch, a court reporter for the district court for Douglas County, that he, the accused,

told Donald Knowles when he and accused were the only persons in a room at the police station that the accused did the shooting at Aronson's, that he used a .32, and that he threw it in the water at about the middle of the bridge.

There is evidence that the captain of detectives of the Omaha police department talked with accused October 23, 1958, concerning the attempted Aronson robbery and he told the detective that he, the accused, participated in the crime committed at that location; that he shot Rasmussen; that there were no promises or threats made to the accused at that time; and that what he said was voluntary and of his own volition.

There is much substantial conflict and there are many inconsistencies and contradictions in the evidence in this case. The defense of the accused is not without substantial support. However, these were all matters for the consideration and determination of the jury. This court will not in a case of the character of the present one resolve conflicts in or weigh the evidence or pass upon the credibility of witnesses. It is implicit in a verdict of guilty in such a case that the jury decided all controverted questions of fact unfavorably to the accused and this court will not disturb the verdict if it is based upon evidence unless, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. Griffith v. State, 157 Neb. 448, 59 N. W. 2d 701; Starkweather v. State, 167 Neb. 477, 93 N. W. 2d 619; Wright v. State, 169 Neb. 497, 100 N. W. 2d 51; Clown Horse v. State, *ante* p. 336, 102 N. W. 2d 625.

In Starkweather v. State, *supra,* this court said: "The credibility of witnesses and the weight of the evidence are for the jury to determine in a criminal case in which the evidence presents an issue of fact as to the guilt or innocence of the accused and the conclusion of the jury may not be disturbed by this court unless it is clearly wrong."

This prosecution is based on section 28-401, R. R. S.

1943, which in part declares: "Whoever shall * * * in the perpetration of or attempt to perpetrate any * * * robbery * * * kill another; * * * every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." This language constitutes homicide in the perpetration or attempt to perpetrate a robbery, a separate offense, as distinguished from ordinary first-degree murder and in a prosecution for such an offense proof is not required of premeditation and deliberation or a purpose to kill. The turpitude involved in a robbery takes the place of deliberate, premeditated malice and the purpose to kill is conclusively presumed from the criminal intention required for robbery. A homicide while perpetrating or attempting to perpetrate a robbery is murder in the first degree. Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151; Rogers v. State, 141 Neb. 6, 2 N. W. 2d 529; Swartz v. State, 118 Neb. 591, 225 N. W. 766; South v. State, 111 Neb. 383, 196 N. W. 684; Keezer v. State, 90 Neb. 238, 133 N. W. 204; Rhea v. State, 63 Neb. 461, 88 N. W. 789.

Section 28-414, R. R. S. 1943, describes the crime of robbery: "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery * * *." It is not essential to constitute the crime of robbery for money or personal property of some value to be taken from the person of the victim. It is sufficient if it is taken from his personal presence or personal protection and custody. The essence of the statute is that the money or property must be in the possession or under the control of the victim and that violence or putting in fear was the means used by the robber to take it. See, Cherpinsky v. State, 122 Neb. 52, 238 N. W. 917; Hill v. State, 42 Neb. 503, 60 N. W. 916. An individual attempts to perpetrate a robbery when he

forcibly by violence or by putting in fear attempts to take from another or from his immediate possession or custody any money or personal property of value with intent to rob or steal.

The accused argues that the testimony of Dilwood should not be believed and that the testimony of Wells, a relative of the accused, must be accepted at face value. Accused asserts because of these conclusions the evidence is so deficient as to fail to sustain the verdict of guilty beyond a reasonable doubt. There is the unchallenged testimony of two persons in the market when Rasmussen was shot that a masked man equipped with a revolver in his hand entered the market; proclaimed he was going to rob it; demanded that money be handed over to him; and in response to an inquiry by Rasmussen if the holdupman was kidding he immediately shot Rasmussen, one of the clerks in the store. This establishes homicide caused during an attempted robbery and hence first-degree murder. There is no evidence to the contrary. The body or substance of the crime, the fact that a crime had been committed without regard to the identity of the person responsible for the crime, was established without contradiction. Accused admitted that he participated in the crime at the market, that he shot Rasmussen, and that he threw the firearm he had in the water about at the center of the bridge. This was a confession. The corpus delicti was established. Reyes v. State, 151 Neb. 636, 38 N. W. 2d 539. In such a situation even an unsupported, extrajudicial admission may be competent and sufficient to establish the connection of the accused with the crime. Wilshusen v. State, 149 Neb. 594, 31 N. W. 2d 544. However, there is more proof which supports the verdict, for instance, a statement of a witness that accused told the witness a few minutes before Rasmussen was shot that he, the accused, was going to rob the market, that witness saw the accused enter the market, that witness heard a report that could have been made by shooting a weapon, that witness

saw the accused run out of the store with something covering his face, and that accused ran down a street in the night away from the market. Soon thereafter that night accused asked the witness to burn the coat in which the witness found a rubber face mask.

The accused could not be identified by Wells as the man who entered the market and shot Rasmussen. He was called by the State as a witness at the trial. He thought the holdupman was taller and heavier than accused and that the voice the witness heard the night of the tragedy was not that of the accused with whom witness had been well acquainted for a number of years. Accused insists that the State should be bound and precluded by the testimony of Wells. The State in redirect examination attempted to impeach Wells by the contents of a statement the State asserts was given by Wells before the trial, but his answers were that he did not remember that he made the statements recited to him by counsel for the State. The defense presented evidence to the effect that Dilwood made statements before the trial in some respects inconsistent with and contradictory of his testimony at the trial. However, these were matters which affected only the quality of the evidence and the credibility of the witnesses and they were matters for the consideration and determination of the jury and not for this court. Evidence tending to show that a person made, before becoming a witness in a case, statements inconsistent with and contrary to his testimony as a witness on the trial thereof, does not dispose of his testimony as to the matters involved. It constitutes a part of the evidence in the case to be weighed and considered in the determination thereof. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. Schluter v. State, 153 Neb. 317, 44 N. W. 2d 588. The record in this case does not permit a conclu-

sion that the proof is insufficient to sustain the verdict.

Accused asserts he was denied due process of law because his alleged confessions were received in evidence at the trial which were obtained respectively on the twelfth and thirteenth days after his arrest, during which time no complaint was filed against him; that he was denied his rights to consult with counsel; and that his counsel was not permitted to contact accused. The evidence that accused admitted to the captain of detectives on October 23, 1958, that he participated in the crime committed at the market and that he shot Rasmussen was offered and admitted in evidence without any objection to its admission. The captain of detectives testified that there were no promises or threats made to or against the accused at that time and that the statements and admissions were made by the accused voluntarily and of his own free will.

Likewise the evidence that accused told a police officer on October 23, 1958, that he, the accused, disposed of the gun he had by throwing it from the Douglas Street Bridge into the Missouri River was without objection admitted at the trial. That statement was a part of the same conversation which the captain of detectives testified accused participated in voluntarily and of his own will and volition on October 23, 1958, and that no promises or threats were made to or against the accused. The accused solicited an opportunity to talk with the deputy county attorney of Douglas County and pursuant thereto there was a conversation between them on October 24, 1958, with no other person present. There was evidence that when that conversation was ended John Gallagher and Jack M. Fitch entered the room and accused then admitted that he had told the deputy county attorney when he and the accused were alone that accused did the shooting at Aronson's, that he used a .32, and that he threw it in the water about the middle of the bridge. There was no objection to the evidence on the ground that it was improperly or

illegally obtained and there could not have been effectively because the information was furnished at a conference solicited by accused and had to satisfy his desire. A motion of accused to strike the evidence concerning admissions made by him as above detailed after the whole evidence of the three witnesses had been concluded was properly denied. All of the evidence within the scope of the motion was not in any event objectionable. The motion was joint as to the evidence of all three witnesses in relation to admissions of accused. It could not properly have been sustained on any theory in the manner it was made. A showing of all that occurred immediately before and at the time of the making of a confession is sufficient foundation for its admission if such proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements and threats. Parker v. State, 164 Neb. 614, 83 N. W. 2d 347; Olney v. State, 169 Neb. 717, 100 N. W. 2d 838. The record in this case satisfies the requirement of the doctrine of those decisions.

The claim of accused that he was not told he had the right to secure the services of a lawyer and that he was not permitted to communicate with anyone from October 11, 1958, until October 24, 1958, is disputed by the record because he had a lawyer before and he was represented by counsel at the preliminary hearing of the charge made against accused and that lawyer saw and consulted with accused on two or three occasions during October 1958. One instance of this was the very day the accused talked with the captain of detectives on October 23, 1958. It is true that on one occasion the lawyer had to wait about half an hour before he could talk with his client but he and the lawyer did consult that day. The record does not show why accused was in custody from October 11, 1958, that he was held without charge, or at what date he became a suspect in the killing of Rasmussen. It was not shown

that accused was excessively or improperly interrogated as to that tragedy or that there was any coercion or force in reference to the accused. The charge of denial of due process of law in the respects specified by accused is wholly unsupported by the record.

Accused complains of the rejection by the trial court of the instruction requested by him which was in substance that it is the law the testimony of an accomplice should be closely scrutinized; and if it appeared to the jury that Marvin Dilwood testified falsely as to material matters concerning issues in the case, then all his uncorroborated testimony should be disregarded. Objection is also made because of the refusal of the trial court to charge the jury, as accused requested in substance, that uncorroborated testimony of a confessed participator of a crime "contradicted under oath by himself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, that another was the instigator or participator in the perpetration of his crime, is insufficient to establish the guilt of the accused beyond a reasonable doubt." The proposed instructions each assumed that Marvin Dilwood was an accomplice or "a confessed participator" in the crime. Evidence is lacking to justify this assumption. There is no showing that he knowingly or with common intent with the principal offender united in the commission of the crime or that he was in any way concerned in, aided, or assisted in the commission of the crime. The evidence is that Dilwood first knew of the intention of the accused to commit a robbery at the market only a few minutes before the crime was attempted which resulted in the death of Rasmussen and upon the first mention of such intention by the accused Dilwood disassociated himself from accused. In 14 Am. Jur., Criminal Law, § 110, p. 841, the following appears: "To constitute one an accomplice he must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent

on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice, as may not, also, the concealment of knowledge or the mere failure to inform the officers of the law when one has learned of the commission of a crime." If Dilwood gave false testimony in some respects concerning the issues of the case, this did not, as a matter of law, require the jury to disregard uncorroborated testimony which he gave on any other subject. It only required the jury to weigh his testimony, give it such weight if any as the jury decided it was entitled to receive, and determine the credibility of Dilwood as a witness in the case. Knihal v. State, 150 Neb. 771, 36 N. W. 2d 109, 9 A. L. R. 2d 891; Schluter v. State, *supra*. Evidence is lacking that Dilwood was inspired by hope of immunity from punishment or that he wanted or had reason for immunity from punishment for any wrongful act. Persuasive of absence of error in this regard is that the trial court gave an instruction on the subject of an accomplice which is not contested by accused as incorrect. The court gave him more in this respect than the law required. The refusal of the requested instructions was proper.

Accused argues that the deputy county attorney as prosecutor of the case made improper and prejudicial statements in his argument to the jury because the effect of them was an expression by the prosecutor of his personal opinion that accused was guilty of the crime charged against him and was not a deduction from evidence in the case, but was based on other and additional information obtained by the prosecutor during investigation made by him. The presentation of the case to the jury by the prosecutor was generally a discussion of the evidence produced by the State; what

the State claimed was established by it; an analysis from the standpoint of the State of the testimony produced by accused, the quantity of which was considerable and the quality of which was substantial in support of the principal defense which was an alibi; and immediately following which, in closing, the prosecutor said: "That, Ladies and Gentlemen, is the sort of testimony that they would have you believe, as opposed to eyewitness accounts by Marvin Dilwood, and his admissions to Ernie Brown and admissions to me in front of Jack Fitch. Can you believe them? Ladies and Gentlemen, Raymond Rasmussen didn't have a chance. This bandit—this robber—this murderer first in that door, says, 'This is a stick-up. Give me your money.',—Blooey —he didn't even have a chance to give him that money. He killed him. He didn't have a chance. Ladies and Gentlemen of the Jury, the evidence in this case is overwhelming—much less beyond a reasonable doubt, and Luther Wilson, while attempting to rob, did kill Raymond Rasmussen." The specific part of the quoted statement claimed to have been improper and prejudicial is: "This bandit—this robber—this murderer - - -." It was dramatized and personalized by the prosecutor turning from the jury, taking one or two steps in the direction of the accused; and while facing and pointing to him, the prosecutor spoke the words above quoted. The demonstration and the speaking of the words applied to accused were simultaneous. Counsel for accused made timely objection to the closing remarks of counsel. "He pointed to the Defendant, calling him a murderer and so forth. At this time, the Defendant asks that it be struck. We ask the Court to declare a mistrial. The motion of Counsel towards the Defendant is expressing his opinion." The objection and motions were denied.

The reference to the accused by the prosecutor was immediately following reference to the eyewitness account by Dilwood and the admissions of the commis-

sion of the crime by accused. This was followed by reference to the evidence in the case being overwhelming that accused while attempting to rob did kill Rasmussen. The State had produced substantial evidence that accused entered the market with masked face, revolver in hand, proclaimed he was there to rob the market, and demanded that the money be handed to him. He wounded and killed Rasmussen for no better reason than he asked accused if he was kidding. The accused was identified by an eyewitness as the perpetrator of the crime. There was evidence by different witnesses of the admissions of guilt by the accused. The evidence permitted a reference to the accused as a bandit, robber, and murderer by the counsel for the State based on or as a deduction from the evidence in the case in its presentation to the jury. It is a justifiable conclusion from the record that what the prosecutor said, the basis of the objection by the accused, was not the expression of the prosecutor of a personal opinion based on information other than the evidence but was an estimation by the prosecutor that the evidence established that the accused was the bandit, robber, and murderer who perpetrated the crime which was committed in the market. The doctrine in this state is that it is highly improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief as to the guilt of a defendant; but if such belief is given as a deduction from evidence, it is not improper. It was said in Roberts v. State, 145 Neb. 658, 17 N. W. 2d 666: " 'It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence.' Balis v. State, 137 Neb. 835, 291 N. W. 477. * * * Here, the county attorney expressed his belief that the evidence was sufficient to sustain a conviction. We do not find prejudicial error in the remark made." See, also, Reed v. State, 66 Neb.

184, 92 N. W. 321; Olsen v. State, 113 Neb. 69, 201 N. W. 969; Annotation, 50 A. L. R. 2d 766.

It was not, under the circumstances of this case, prejudicial error for the prosecutor in the argument of the case to characterize accused by the words used. In Dobry v. State, 130 Neb. 51, 263 N. W. 681, this court stated: "With reference to the alleged misconduct of the assistant prosecutor in referring to the defendant as a murderer and an assassin, we are of the opinion that it was not prejudicial error under the situation as it existed in this case. The statements hereinbefore quoted followed a general summation of the evidence and are conclusions that could readily be inferred from the facts. There was no personal belief expressed that the defendant was a murderer or assassin. From the facts previously detailed it was fairly deducible that the defendant was a murderer and assassin. Under such circumstances, the prosecutor may state conclusions which are predicated upon the evidence. This does not mean that such statements may not constitute error if made for purposes of vilification or vituperation." See, also, Lee v. State, 124 Neb. 165, 245 N. W. 445; Grandsinger v. State, 161 Neb. 419, 73 N. W. 2d 632.

The prosecutor in his argument to the jury referred to admissions of the accused made to the prosecutor in front of Jack M. Fitch. Accused argues this was prejudicial to him because it implied he made incriminating statements to the prosecutor during his investigation of the crime committed in the market which were not in evidence and consequently the prosecutor was an unsworn witness. The prosecutor mentioned specifically admissions in front of Jack M. Fitch who testified that accused admitted to the prosecutor that he, the accused, did this shooting at Aronson's, that he used a .32, and that he threw the gun in the water about the middle of the bridge. There was no basis for implication or inference that the prosecutor received any other or different information from the accused. However, this

objection is not available at this time because the record does not show that any objection was taken to that part of the statement of the prosecutor. The objection which was made was limited to the demonstration made by the prosecutor towards accused and the words spoken at the same time which characterized him as a bandit, robber, and murderer. Objection after completion of the trial in such a situation is futile. If there is no objection made in respect to an alleged improper statement of opposing counsel to the jury at the time of the making thereof, there can be no prejudicial error predicated upon the alleged misconduct. It is too late to make an objection in such a situation in the motion for a new trial. Mulder v. State, 152 Neb. 795, 42 N. W. 2d 858; Swartz v. State, *supra;* Carter v. State, 115 Neb. 320, 212 N. W. 614.

The State produced and examined George Battles as a rebuttal witness. He said he was at the home of Mrs. Givehand, a sister of accused, on Blondo Street February 28, 1958, attending a party commencing about 7 p. m. and continuing practically the whole night. He and accused played a card game called Tonk and later the game was changed to Whist but the witness and accused were engaged in cardplaying practically the whole night. The witness said accused did not leave the party. There is undisputed evidence in the record that the party ended near 1 a. m. in the morning on March 1, 1958. The witness was asked if he had made a statement to the county attorney before the trial. He admitted that he had but did not remember the date of it. The State without more foundation attempted to examine the witness concerning alleged matters in the statement inconsisent with the testimony he had given. Accused objected that the State was attempting to impeach its witness and that there was no showing that the State was surprised or that the witness was hostile to it. The matter was considered without the presence of the jury. The witness testified that he

talked with the prosecutor at the office of the county attorney before testifying at the trial and he then told the prosecutor when they were reviewing the questions contained in the statement that he "never said some of them statements" and that there were some things which the witness did say when the statement was given that "weren't in the statement." The witness also testified that before he was called as a witness at the trial he told the prosecutor at his office that the witness gave the accused $10, he gave the $10 to Elnora, she went and got the liquor, and accused did not leave the house. The objection was overruled and the witness was asked if he had stated the matters contained in the alleged contradictory statement given the prosecutor prior to the trial. The witness admitted some of them, denied others, and disclaimed remembrance as to certain of the questions and answers contained in the statement. The State then produced evidence that the witness by his previous statement given the prosecutor had said that he asked him (accused) if he was going to get the whiskey and Luther (the accused) got up and left; that that was about 9 p. m. (February 28, 1958, the night of the party); that Dilwood was then at the party when accused left; and that Dilwood left the party before the accused came back.

The evidence is not disputed that the county attorney was told before the witness was called to testify that at the party he gave money to the accused to secure whiskey, that accused gave it to his sister Elnora, that she got the whiskey, and that accused did not leave the house. Neither is it disputed that the witness in effect repudiated the contradictory statement by telling the county attorney it was not correct in that it contained things the witness did not say and it failed to contain things that he did say. It affirmatively appears that the prosecutor was not surprised or misled by the statement and he was bound to know in the circumstances that if George Battles were made a witness he would say that

accused did not leave the home of his sister the evening or night of the party until it ended early the following morning. The only significant conflict between the testimony of George Battles and the statement he gave the prosecutor was that in the former the witness said accused did not leave the house of his sister during the party on the night of the crime until the party ended and in the latter the witness said accused left and went to get whiskey about 9 p.m. that evening. A witness may, subject to conditions and limitations, be impeached by the party calling him by showing that he made a statement out of court contrary to one made in court concerning a matter relative to a fact in issue. This doctrine was adopted in this state in Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265, by this language: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial." The statement from that case quoted above was recited in Blochowitz v. Blochowitz, 122 Neb. 385, 240 N. W. 586, 82 A. L. R. 949, and the opinion then made these remarks: "But in the instant case the plaintiffs, in the light of the facts fully known to them when they called this witness to the stand during the trial here under review, could not have been 'misled' or 'entrapped' by the statements appearing in the first deposition, in view of his subsequent testimony in the county court. It is incredible that they, then, in any manner relied thereon or were deceived by the testimony in this case actually given, and that they were actually 'surprised' thereby is a conclusion wholly unsupported by the record and

inconsistent with common sense. The prerequisites to invoking the application of the rule quoted were wholly absent, and the trial court therefore, it is considered, erred in failing to sustain objections seasonably made to this line of examination pursued by plaintiffs, who are in turn under the facts in this case bound by the evidence elicited by them, otherwise uncontradicted, unmodified by the evidence thus erroneously received."

The attempt of the State to impeach its rebuttal witness should have been refused by the trial court. Its failure in this regard was error. This is not to say, however, that the error was prejudicial to accused under the circumstances. George Battles testified as a witness for the State that accused was at the home of his sister at a party from as early as 7 p. m. during practically the whole night and that he did not leave there during that period. In that respect the testimony of the witness was favorable to the accused and was corroborated by several persons who attended the party and testified positively to the same fact. The impeaching testimony did not controvert, eliminate, or destroy the testimony of the rebuttal witness. It was not substantive evidence of the facts declared therein and was only received to aid the jury in estimating the character and credibility of the witness. Schluter v. State, *supra*. The district court by instruction limited the purpose of the impeaching evidence in accordance with that doctrine and it must be assumed that the jury observed the mandate of that instruction. The error in this respect was not legally prejudicial to accused.

A complaint is made that accused was prejudiced by the jury basing the sentence imposed on the false assumption that a parole is too easy to secure. This was presented by a motion for a new trial and a showing intended to support it or at least to originate an inquiry. The duty of a jury in a case of this character is to ascertain the guilt or innocence of the accused; and if its verdict is guilty, to determine the penalty as the law

provides. The decision of the jury should not be influenced by or rest upon the fact of whether a parole, pardon, or other clemency is easy or difficult to secure. Griffith v. State, *supra*. There is no competent showing of any violation of this doctrine in this case.

The judgment and sentence should be and each is affirmed. It should be and is adjudged that the sentence and judgment of the district court for Douglas County rendered and entered in this case be executed on Friday, the 23rd day of September 1960.

AFFIRMED.

IN RE ESTATE OF CHARITY B. COUCH, DECEASED. NEBRASKA WESLEYAN UNIVERSITY, A CORPORATION, APPELLEE, V. ESTATE OF CHARITY B. COUCH, DECEASED, APPELLANT.
103 N. W. 2d 274

Filed May 27, 1960. No. 34771.

1. **Subscriptions.** The assumption of an obligation, express or implied, by a university incorporated under the laws of this state, to keep an endowment fund intact and to use the income thereof for the payment of scholarships for worthy girls, is a sufficient consideration for a subscription to such fund in the form of a promissory note payable at the maker's death.
2. ———. The assumption of such obligation may be implied from the acceptance and retention of such subscription contract by the donee.
3. ———. Conditions and restrictions contained in or endorsed upon a subscription note, not inconsistent with the subscription contract and which were accepted by the donee, do not have the effect of destroying the original consideration for the contract.

APPEAL from the district court for Keith County: JOHN H. KUNS, JUDGE. *Affirmed.*

Baskins & Baskins, for appellant.

Stewart, Stewart & Calkins and *James W. Hewitt*, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action upon a subscription note in favor of the endowment fund of Nebraska Wesleyan University. The defense of no consideration was asserted. The trial court found for the plaintiff and the defendant has appealed.

Nebraska Wesleyan University was incorporated under the laws of Nebraska in 1887 and since that date has continuously operated a nonprofit educational institution known as Nebraska Wesleyan University at Lincoln. The endowment fund of the university was established more than 40 years ago. It has always been divided into unrestricted funds which contain assets on which no restrictions were imposed by donors on the use of the income and restricted funds which contain assets on which restrictions were imposed. The restricted funds are divided into several specific funds, including a scholarship fund, in order that the income from such funds may be used in compliance with the restrictive use specified by the donors.

On November 9, 1927, Charity B. Couch executed and delivered to the university a subscription note in words and figures as follows: "In consideration of my interest in Christian Education and of other subscriptions to this Endowment, Building and Expense Fund, I hereby subscribe and promise to pay to the Nebraska Wesleyan University, the sum of Five thousand and No/100 DOLLARS. When this note is paid it shall become a part of Scholarship Fund to help worthy girls through the University. Due and payable at or before my death. For value received, subject to the following conditions: (printed conditions stricken)."

The stated consideration is sufficient in the foregoing note under our holdings in In re Estate of Griswold, 113 Neb. 256, 202 N. W. 609, 38 A. L. R. 858; In re Estate

of Luce, 137 Neb. 846, 291 N. W. 562; and Cotner College v. Estate of Hester, 155 Neb. 279, 51 N. W. 2d 612. In the Griswold case the court said: "While in the case of a mere promise to make a gift or donation to a college subject to no condition and imposing no obligation upon the college with respect thereto could not be enforced, we think that when, as in this case, the college is required to perform certain duties with respect to the specific fund, its acceptance thereof and reliance thereon and promise to carry out the wishes of the donor supply the consideration." We adhere to this holding and conclude that an adequate consideration exists for the foregoing subscription note.

It is the primary contention of the defendant, however, that certain writings in and on the back of the subscription note indicate a want of consideration for the note. The writings on the back of the note are as follows:

"At any time, the maker of this note desires she may pay any part of this note & the Nebr. Wesleyan University agrees to issue Annuity Bond for the Amount paid & pay interest on such Annuity Bond Semi Annually.

"Paid by check 11-9-27 - $500.00 Above credit cancelled by our check for $500.00 to Mrs. Couch. See Check Register P. 211.

"Ogallala Neb. Jan 17 1934. To establish the Ilus and Charity Couch Memorial Scholarships Charity Couch."

Defendant contends that these writings written in longhand control the printed portion of the subscription note. We agree that this is correct where there is conflict between the printed and written portions of the instrument. Jacobsen v. Farnham, 155 Neb. 776, 53 N. W. 2d 917, 33 A. L. R. 2d 543.

The purpose of the writings was to provide for payments on the subscription note prior to the donor's death, with a retention of the income therefrom until her death. We find nothing in this that would in any manner af-

fect the consideration shown by the face of the note. The writings show that the donor did pay $500 on the note on November 9, 1927. At her request the university returned the $500 to her in lieu of an annuity bond for that amount. The receipt given by the donor authorized the cancellation of the $500 credit on the subscription note and provided further that it would leave "the estate note for $5,000 to be paid out of my estate at my death." This was in accordance with the optional method of payment contained in the writing and in no way affected the consideration recited on the face of the note.

It is contended that the written portion of the face of the note providing, "When this note is paid it shall become a part of Scholarship Fund to help worthy girls through the University," and the writing on the back of the note providing, "To establish the Ilus and Charity Couch Memorial Scholarships," indicate a want of consideration for the note. We point out that the one is a restriction upon the use of the income and the other a condition, both of which were impliedly agreed to by the university by its acceptance and retention of the note. They were not inconsistent with the promise of the donor to pay the $5,000 to the Endowment, Building and Expense Fund, in view of the many specific funds set up within the scope of the endowment fund for the purpose of carrying out the desires of donors. The willingness of the university to name the fund the Ilus and Charity Couch Memorial Scholarships and to use the income to help worthy girls through the university is not inconsistent with her interest in Christian education and of other subscriptions to the endowment fund, the consideration stated on the face of the note. We conclude that the restrictions and conditions, impliedly accepted by the university, were consistent with and not incompatible with the consideration recited on the face of the note. Conditions and restrictions contained in or endorsed upon a subscription note, not in-

consistent with the subscription contract, and which were accepted by the donee, do not have the effect of destroying the original consideration for the contract. Consequently, a valid consideration for the subscription note existed and the defense of no consideration is without merit.

The trial court having arrived at the same conclusion, the judgment is affirmed.

AFFIRMED.

JOSEPH BEZDEK, APPELLANT, V. KENNETH PATRICK, APPELLEE.
103 N. W. 2d 318

Filed June 3, 1960. No. 34702.

1. **Judgments.** It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action.
2. **Appeal and Error.** The rule that the findings of this court on a first appeal become the law of the case on a retrial of the same issues is not available where on the second trial the facts are materially and substantially different.
3. ———. Where on appeal findings of fact are made which become the law of the case and there is a remand for a new trial, on such retrial, such findings are binding on the parties, the trial court, and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and the burden of showing a difference shall rest upon the party making the claim.
4. ———. The determination of the question of whether or not the evidence on a retrial is different from that adduced on an earlier trial is one for the court and not for the jury.
5. ———. When, upon remand, new issues of fact are properly raised which were not present in the former adjudication and there is sufficient competent evidence adduced to support such new allegations of fact to make them a jury question, the doctrine of the law of the case has no application thereto.

6. **Automobiles: Highways.** A driver of a motor vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection.
7. ———: ———. Where the driver of a motor vehicle approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury.
8. ———: ———. A motor vehicle which has entered an intersection or is passing through it at a lawful speed has the right-of-way over a motor vehicle approaching the intersection from a different direction into the path of the first vehicle.
9. **Negligence.** Although a person may have negligently exposed himself or his property to an injury, nevertheless, if the defendant, after discovering his exposed situation, negligently injures him or is guilty of negligence in not discovering his dangerous position in time to avoid the injury, and injury results because thereof, he may still recover.
10. ———. A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a situation involves questions of comparative negligence and not those of the last clear chance doctrine.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded.*

Martin A. Cannon and *Mathews, Kelley & Stone,* for appellant.

Crawford, Garvey, Comstock & Nye, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is the second appearance of this cause in this court. See Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482. Therein we vacated a verdict in favor of defendant Kenneth Patrick, reversed a judgment entered thereon, and remanded the cause generally for retrial.

Plaintiff Joseph Bezdek's cause of action was again tried and submitted to a jury, which brought in a verdict for defendant on which judgment was entered. Plaintiff filed a motion for new trial and has perfected this appeal from the overruling thereof.

We shall not again set out the basic facts upon which appellant's cause of action is premised for they are fully and correctly set out in our first opinion. Appellant contends that he was not given the benefit of our holding in that opinion to the effect that appellee, in certain respects, was guilty of negligence as a matter of law. In our first opinion we held that appellee was guilty of negligence as a matter of law in that he did not maintain a proper lookout and in that he did not have his truck under control. On the second trial the trial court did not so inform the jury but submitted the matter of these two issues to the jury as a fact question. The principles applicable to this contention are as follows:

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action." Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660. See, also, Benedict v. Eppley Hotel Co., 161 Neb. 280, 73 N. W. 2d 228.

"The rule that the findings of this court on a first appeal become the law of the case on a retrial of the same issues is not available where on the second trial the facts are materially and substantially different." Callahan v. Prewitt, *supra*. See, also, State ex rel. Davis v. American State Bank, 115 Neb. 81, 211 N. W. 201; Phelps County Farmers' Mutual Ins. Co. v. Johnston, 66 Neb. 590, 92 N. W. 576.

"Where on appeal findings of fact are made which become the law of the case and there is a remand for

a new trial, on such retrial, such findings are binding on the parties, the trial court and this court, unless on the retrial the facts relating to the issues upon which the findings were made are materially and substantially different from those adduced on the former trial, and the burden of showing a difference shall rest upon the party making the claim." Callahan v. Prewitt, *supra*. See, also, Benedict v. Eppley Hotel Co., *supra*.

"The determination of the question of whether or not the evidence on a retrial is different from that adduced on an earlier trial is one for the court and not for the jury." Callahan v. Prewitt, *supra*. See, also, Benedict v. Eppley Hotel Co., *supra*.

Appellee did not show the facts relating to these issues, upon which our findings were made, were materially and substantially different at the second trial from those adduced on the first trial. In fact, he made no showing as to what they were on the first trial. In view thereof our previous findings in regard thereto were binding on appellee, the trial court on the second trial, and upon us on this appeal. Not only was the appellee guilty of negligence in these two respects, which are specifications of negligence (a) and (b) as found in the trial court's instruction No. 2, but the evidence establishes that such conduct was, as a matter of law, a proximate cause of the accident in which appellant was injured. Appellant was entitled to have the jury so informed and it was prejudicial error on the part of the trial court not to do so.

In the original action appellee pleaded contributory negligence as a defense but did not set out any specifications of negligence on the part of appellant relating thereto but did in connection with a counterclaim, which was withdrawn at the second trial. Upon remand appellee was granted leave to amend his answer by setting out numerous specifications of negligence under his defense of contributory negligence and by its instruction No. 3 the trial court submitted 11 of these to

the jury. It is of course true that when, upon remand, new issues of fact are properly raised which were not present in the former adjudication and there is sufficient competent evidence adduced to support such new allegations of fact to make them a jury question, the doctrine of the law of the case has no application thereto. State ex rel. Davis v. American State Bank, *supra*.

But in the former adjudication certain issues as to appellant's conduct being negligent were raised and we determined, in regard thereto, that there was no evidence of any absence of control by appellant of his automobile that could in any way have been considered negligence or that could be considered as having contributed to the collision; that the charge of negligence of appellant consisting of absence of control by him of his automobile should not have been submitted to the jury; that the charge that appellant failed to have and maintain a proper lookout was unfounded; that there was no evidence to support or justify the charge that appellant failed to apply his brakes; and that there was no fault shown on the part of appellant which caused his inability to engage the second gear of his automobile. In view of the record we think the law of the case is applicable to the foregoing for the same reasons as have been hereinbefore set forth. Consequently the trial court should not have submitted specifications of negligence numbered 2, 9, and 10, as found in its instruction No. 3, and it was error for the trial court to do so.

In our first opinion we said appellee pleaded contributory negligence and that this issue should, under the record as made, be submitted to the jury as a factual matter for its determination upon proper instructions. As stated in Pankonin v. Borowski, 167 Neb. 382, 93 N. W. 2d 41: "If there is evidence which will sustain a finding for the litigant who has the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law."

From the evidence adduced a jury could find that

appellant approached the intersection of Sixtieth and L Streets from the north on Sixtieth Street; that he stopped his car on the west half, or the lane for southbound traffic, of the surfaced area of Sixtieth Street just to the north of a stop sign; that the stop sign was located just to the west of the surfaced area of Sixtieth Street and east of a filling station located to the northwest of the intersection; that the south side of this filling station was 34 feet north of the surfaced area of L Street west of the intersection, which surfaced area was 20 feet wide; that when he stopped his car appellant's view to the west on L Street was partially blocked by the filling station; that he looked to the west as far as he could, which was some 100 to 150 feet, but did not see any vehicle approaching on L Street from the west; that appellant then put his car in low gear and proceeded forward very slowly, continuing to look to the west; that when his car had gone forward far enough that he could see to the west as far as Seventy-second Street he saw appellee's truck approaching from that direction at a point which appellant describes as a low spot on L Street, which low spot his estimates placed at various distances west of Sixtieth Street; that the truck was traveling east in the south lane of L Street, which was for eastbound traffic; that appellant continued toward the intersection at from 2 to 7 miles an hour, watching the appellee's truck while doing so; that appellant tried to get his car into second gear, it having a mechanical hand gear shift, but was not successful in doing so; that while he was trying to shift gears his car almost came to a stop; that he got it back into low gear and continued to proceed on into the intersection; that he continued at all times to watch appellee's truck, which he estimated was coming at 60 miles an hour; that the truck was not slowing down; that the truck was not changing its course; that he thought there was a stop sign on L Street west of the intersection which would cause appellee to stop his truck; that he stepped

on the gas to speed up his car but was not able to increase its speed because he had his foot on the clutch pedal; that he did not blow his horn; that he proceeded on into the intersection at from 2 to 7 miles an hour and possibly got up to 10 miles an hour before being hit; and that the right front side of his car was hit by the left front of the truck at a point 7 feet 5 inches south of the center line of L Street and 3 feet 3 inches west of the center line of Sixtieth Street.

"A driver of a vehicle about to enter a highway protected by stop signs must stop as directed, look in both directions and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection." Meyer v. Hartford Bros. Gravel Co., 144 Neb. 808, 14 N. W. 2d 660.

In view of the foregoing we think appellant's conduct presented a question for the jury under the following principle: "Where the driver of a car approaching a through street or highway stops and looks and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury." Borcherding v. Eklund, 156 Neb. 196, 55 N. W. 2d 643. See, also, Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482; Bezdek v. Patrick, 164 Neb. 398, 82 N. W. 2d 583; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596.

In view of the foregoing statement of facts and principles applicable thereto specifications of contributory negligence Nos. 3, 4, 5, and 8, as set out in the court's instruction No. 3, were properly for submission to the jury. Specifications Nos. 7 and 11, submitted by the court in its instruction No. 3, merely relate to evidentiary facts involved in the issues properly submitted and should not have been separately submitted as

specifications of negligence. Specification No. 6 of instruction No. 3 is too general in its scope and should not have been given. It would permit the jury to consider any fact it might desire on the issue of contributory negligence.

As we said in Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482: "In the trial of an action concerning a collision of a truck and an automobile on an intersection of a favored street and a nonfavored street which involves issues of negligence and contributory negligence, the jury should be fully and precisely instructed as to relative and reciprocal rights and duties of the operators of the motor vehicles in entering and using the intersection." These rights and duties may be found set out in Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482; Paddack v. Patrick, 163 Neb. 355, 79 N. W. 2d 701; Simcho v. Omaha & C. B. St. Ry. Co., 150 Neb. 634, 35 N. W. 2d 501; McCulley v. Anderson, 119 Neb. 105, 227 N. W. 321.

Specification No. 1 of the court's instruction No. 3 submitted the issue of appellant's "Failure to yield the right of way." As we said in Pankonin v. Borowski, *supra:* "A motor vehicle which has entered an intersection or is passing through it at a lawful speed has the right-of-way over a motor vehicle approaching the intersection from a different direction into the path of the first vehicle." There is no evidence to support this specification of contributory negligence and the trial court was in error in submitting it as an issue.

The appellant is entitled to a directed verdict against appellee, insofar as appellee's liability is concerned, and the only question for the jury is, was the appellant damaged and, if so, how much. However the latter, under the evidence adduced and hereinbefore set forth, is subject to the defense of contributory negligence. See, § 25-1151, R. R. S. 1943; Blanchard v. Lawson, 148 Neb. 299, 27 N. W. 2d 217; Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482. As stated in Bezdek

v. Patrick, 167 Neb. 754, 94 N. W. 2d 482: " '* * * under the comparative negligence statute, section 25-1151, R. S. 1943, even if it could be said that defendant was guilty of negligence as a matter of law, * * * and it could be found that plaintiff was guilty of only slight negligence, the question whether or not defendant's negligence was gross in comparison therewith would still be a factual one for determination by the jury.' " In order to properly consider this defense and make the comparison thereunder, which it is the jury's duty to make in case it finds appellant was guilty of contributory negligence, the jury should not only be advised of what negligence the appellee is guilty of as a matter of law but should, under proper instructions, be permitted to determine, as a matter of fact, whether or not appellee has been guilty of any other specification of negligence claimed by appellant and which finds support in the evidence. These would, under the record before us, include specifications Nos. (c), (d), (e), and (f), as contained in the court's instruction No. 2.

Appellant complains of the fact that the trial court sustained appellee's motion to strike from his amended petition his allegation setting up the last clear chance doctrine. The doctrine of the last clear chance is stated in Carnes v. DeKlotz, 137 Neb. 787, 291 N. W. 490, as follows: "Although a person may have negligently exposed himself or his property to an injury, nevertheless, if the defendant, after discovering his exposed situation, negligently injures him or is guilty of negligence in not discovering his dangerous position in time to avoid the injury, and injury results because thereof, he may still recover."

If appellant was guilty of negligence it continued up until the moment of impact. Under this situation the following is controlling: "A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a

situation involves questions of comparative negligence and not those of the last clear chance doctrine." Trumbley v. Moore, 151 Neb. 780, 39 N. W. 2d 613. See, also, Bush v. James, 152 Neb. 189, 40 N. W. 2d 667; Roby v. Auker, 149 Neb. 734, 32 N. W. 2d 491.

We have come to the conclusion that the judgment of the lower court denying appellant a new trial must be reversed. We therefore reverse the judgment of the trial court doing so with directions to grant appellant a new trial and remand the cause for such retrial, same to be conducted according to the law applicable thereto, including our holdings in this and our previous opinion relating thereto.

REVERSED AND REMANDED.

ELMER BLOCK ET AL., APPELLANTS, V. LINCOLN TELEPHONE & TELEGRAPH COMPANY, A CORPORATION, ET AL., APPELLEES.
103 N. W. 2d 312

Filed June 3, 1960. No. 34722.

1. **Public Service Commissions.** By the Constitution the powers and duties of the State Railway Commission include the regulation of rates, service, and general control of common carriers as the Legislature may provide by law.
2. ———. In the absence of specific legislation the State Railway Commission shall exercise the powers and perform the duties of regulation of rates, service, and general control of common carriers.
3. **Telecommunications: Carriers.** Within the meaning of the Constitution telephone companies are common carriers.
4. **Telecommunications: Public Service Commissions.** Telephone companies operating in this state are subject to all reasonable orders of the State Railway Commission entered upon hearings duly and legally had as to rates to be charged and time and manner of service to be rendered.
5. ———: ———. By statute, no person, firm, partnership, corporation, cooperative, or association shall offer telephone service or construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the

State Railway Commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission.

6. **Telecommunications.** A subscriber to telephone service directly affected is a party in interest in a hearing to determine whether or not, on the basis of convenience and necessity, his existing service shall be taken away.

APPEAL from the Nebraska State Railway Commission. *Reversed.*

Muffly & Snyder, for appellants.

J. Taylor Greer, Allen L. Overcash, Woods, Aitken & Aitken, and *Marti, O'Gara, Dalton & Sheldon,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action or proceeding which was commenced by Elmer Block, Merle Wilhelm, and Roca Elevator Company, complainants, by the filing of a complaint with the State Railway Commission against Lincoln Telephone and Telegraph Company, a corporation, Capitol Telephone Company, a corporation, and Martell Telephone Company, a corporation, defendants. Hereinafter Elmer Block will be referred to as Block, Merle Wilhelm as Wilhelm, Roca Elevator Company as Roca, Lincoln Telephone and Telegraph Company as L. T. & T., Capitol Telephone Company as Capitol, and Martell Telephone Company as Martell.

To the extent necessary to point out here, it is set forth in the complaint that Block and Wilhelm are farmers living in Lancaster County, Nebraska; that Block had been a subscriber for telephone service from L. T. & T. at his farm location since 1944; that Wilhelm had been a subscriber at his farm location since 1917; that Block was the president and managing officer of Roca; that Roca had been a subscriber for telephone service from Martell since 1923; that on or about August 14,

1958, L. T. & T. advised Block and Wilhelm that it would not furnish them telephone service after December 1, 1958; that the stated reason for this was that their locations were in territory which had been granted to Capitol; and that on or about September 4, 1958, Martell advised Roca that it would not be able to serve it with telephone service after December 1, 1958, for the reason that Roca was within the territory of L. T. & T.

So that confusion may be avoided it is stated here that Capitol is the real party defendant in interest with L. T. & T. It is successor to the rights of Martell under approval of the commission.

The complainants allege that they are entitled to retain and be furnished the service which had been supplied prior to December 1, 1958, on the basis of convenience and necessity, and on account of failure of notice to them of change of territory of L. T. & T. and Capitol.

The prayer of the complaint was for a hearing, an investigation, and a mandate of the commission requiring the continuance of the preexisting telephone service.

By answer Capitol and Martell admitted the alleged notices of discontinuance of service had been given by Martell and L. T. & T. It is alleged that in 1944 the telephone service furnished to Block at his farm location was in territory served by Martell; that L. T. & T. and Capitol, in the spring of 1958, agreed that this was in Capitol territory; that the commission so established these territories by its order on June 18, 1958; that the status of the service to Wilhelm was the same as that of Block; and that this order excluded Roca from the Capitol territory. In this connection it is alleged that this order of the commission involved no change in the territory which had theretofore been occupied by L. T. & T. and Capitol.

L. T. & T. filed an answer by which it admitted the notice of Martell to Roca, and also the notice to Block and Wilhelm that it would not be able to serve them after December 1, 1958. By the answers the status of

the defendants as common carriers declared in the complaint is admitted. By prayers of the answers the commission was asked to dismiss the complaint.

A hearing was had on the complaint, after which the commission made findings and entered an order by which, among other things, it dismissed the complaint. The other matters are not within the purview of the issues presented by the pleadings or the record of the hearing. The order contains an exaction that L. T. & T. forthwith discontinue furnishing telephone service to Block and Wilhelm at their residences, and that Capitol forthwith discontinue telephone service to Roca. No request for such action was presented to the commission by this or any other formal proceeding.

The questions presented by the briefs are numerous, but the primary question which was presented to the commission and to this court on appeal is that of whether or not under the Constitution and statutes of Nebraska, L. T. & T. had the right, under the circumstances, to withdraw and refuse telephone service to Block and Wilhelm, and whether or not Capitol had the right to withdraw and refuse telephone service to Roca.

The State Railway Commission was created and its powers declared by Article IV, section 20, of the Constitution of Nebraska. The powers therein declared are the following: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

Within the meaning of the Constitution telephone companies are common carriers. Farmers & Merchants Telephone Co. v. Orleans Community Club, 116 Neb. 633, 218 N. W. 583. In this case appears the following: "Telephone companies operating in this state are subject to all reasonable orders of the state railway commission, entered upon hearings duly and legally had, as to rates

to be charged, and time and manner of service to be rendered; and such orders will not be disturbed unless clearly wrong."

A matter of significance is that it is pointed out in that opinion, which was rendered in 1928, that the validity of the orders of the commission depend upon hearings duly and legally had.

The question of whether or not these companies had the right of withdrawal must depend, at least to some degree, upon their status in 1958 and prior thereto, which necessarily includes the manner of acquisition of status, if that may be ascertained.

It may be stated with certainty that the record presented to this court fails to disclose authentically that prior to 1958 any action or attempt at action was taken by the commission to declare or define the territory of Martell or its successor, Capitol. There is testimony that in 1958 there was a grant of a certificate of convenience and necessity, which was a part of an order confirming a transfer of Martell to Capitol. The record in this case, however, does not contain that order. The record fails to disclose that the commission, until the hearing herein, ever attempted officially to make any declaration as to the territory or boundary of L. T. & T. at any time prior to the action taken in the proceeding from which the appeal herein was taken.

Attention has not been called to any constitutional or statutory provision requiring such action by the commission. This is not to say, however, that the commission lacked or lacks the power to so act.

How the area of operation and service of Martell, to which Capitol has succeeded, and that of L. T. & T. were originally established, and when, is not disclosed. The dividing line between the two, according to the evidence of witnesses, was established by agreement between Martell and L. T. & T. The time when this was done does not clearly appear, but the reasonable inference is that this was at least as early as 1944. It appears

that in that year Martell and L. T. & T. agreed that Roca was in the L. T. & T. area but was receiving Martell service, and that Block and Wilhelm were in the Martell area but were receiving L. T. & T. service. This agreement appears to have been renewed in 1958. This agreement was called to the attention of the commission but no formal action was taken then or thereafter until 1958 after Martell and L. T. & T. served the notices of discontinuance of service which have been described herein. These notices were not of hearing to be had before the commission on application for leave to discontinue service, but of peremptory refusal by Martell and L. T. & T. to continue service after a named date.

It should be pointed out that Block and Wilhelm do not contend that the service they were receiving, which provides the basis for this action, was not from L. T. & T. in the Capitol area, and Roca does not contend that the service it was receiving was not from Capitol in the L. T. & T. area.

These are the circumstances which must be considered in making a determination as to whether or not the peremptory withdrawal of the preexisting service was proper.

Attention has not been called to any statute, and none has been found, which prior to 1951 prevented one telephone company from invading the territory of another and rendering service therein. Likewise the record in this case does not direct attention to evidence of any such established rule or order of the commission. It is true that in the briefs attention is called to a purported order of the commission made in 1934 as follows: "That no telephone company operating in the State of Nebraska as a common carrier shall after June 1, 1934, construct a new telephone line or extend an existing telephone line into the territory of another company operating as a common carrier without first making application for and receiving from the Nebraska State Railway Commission a certificate of convenience and

necessity." Attention has not, however, been called to it by the record made in this case.

In 1951, section 86-213, R. R. S. 1943, was enacted which contained the following: "No person, firm, partnership, corporation, cooperative, or association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the State Railway Commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission."

As an observation, in the light of general knowledge as to the use of telephones, it appears proper to say that the term convenience and necessity ordinarily connotes the telephone company, those it serves, and those seeking service.

Also attention has not been called to any statute requiring withdrawal in case of invasion by one of the territory of another, or defining rights of the companies or of subscribers in the case of attempted voluntary withdrawal.

On the record presented here it may not be said that the attempted withdrawals of service were made pursuant to constitutional or statutory plan or requirement, or by exaction of an order of the commission, but by each company on a voluntary and ex parte basis.

The interpretation of the views of the appellees as expressed in their briefs does not however conform to this conclusion. They appear to insist that the order of the commission establishing Capitol as the successor to Martell and declaring the issuance of a certificate of convenience and necessity in 1958 amounted to an order requiring L. T. & T. to withdraw service from Block and Wilhelm and requiring Capitol to withdraw service from Roca. This insistence may not be sustained.

As already pointed out, that order has not been brought to this court by the record. Even if it had, and assum-

ing that it contains what is contended for it, it would avail L. T. & T. and Capitol nothing. Reasons for this are that L. T. & T., Roca, Block, and Wilhelm were not parties to that proceeding; no reference was made to the service involved; no attempt was made to define or declare a line between L. T. & T. and Capitol; nothing was taken from L. T. & T. and given to Capitol and nothing taken from Capitol and given to L. T. & T.; and nothing was therein contained which purported to affect in any way L. T. & T. or Block and Wilhelm.

The basic question therefore is that of whether or not L. T. & T. and Capitol, without proper notice and hearing, had the right to withdraw the service which they had been furnishing as common carriers to these, their subscribers.

In final analysis the answer under the record presented depends upon the question of whether or not, where the relationship of telephone carrier and subscriber has become established, that relationship may be destroyed or discontinued contrary to the wish of the subscriber without permission duly granted, after notice and hearing, by the commission. As has been pointed out, the commission is clothed with the constitutional right and duty to regulate service, and this duty, this court has said, is to be exercised by the entry of orders on hearings duly and legally had.

It is of course true that the subscriber is a necessary party in interest in the matter of telephone service. There is nothing in the constitutional provision relating to regulation of service which limits the regulatory power and duty of the commission to the supplier of the service. In reason therefore it would appear that a subscriber should be entitled to a hearing on the matter of deprivation of existing service as well as upon an application to require a telephone company to extend service to him.

In Interstate Common Carrier Council v. United States, 84 F. Supp. 414, the following from section 2323

of the New Judicial Code (28 U. S. C. A., § 2323, p. 133) was quoted: " '* * * any party or parties in interest to the proceeding before the Commission * * * may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party. Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.' " This was affirmed by the United States Supreme Court in 338 U. S. 843, 70 S. Ct. 91, 94 L. Ed. 516.

In Crichton v. United States, 56 F. Supp. 876, affirmed in 323 U. S. 684, 65 S. Ct. 559, 89 L. Ed. 554, it was said: "Turning to the merits, objection is futile that the Commission erred in taking past operations into consideration in determining the present or future public convenience and necessity of the applicant's operations."

These cases are not telephone service cases. They do however relate to common carriers and their duties with reference to the exactions in relation to the organizations and individuals served. They make clear that individuals as well as organizations are entitled to be heard and that past operations and future needs are proper subjects of hearing.

Any other attitude would, as may readily be seen, furnish the opportunity for grave and incalculable injustice. This is true since otherwise no opportunity would be afforded for the production of evidence necessary to be considered in determining the matter of true convenience and necessity. It would permit action without the right to present the facts essential to a proper determination of basic questions involved. In short it would be a denial of due process of law. The rule is well stated in 73 C. J. S., Public Administrative Bodies and Procedure, § 142, p. 472, as follows: "An admin-

istrative agency may not act unreasonably or capriciously, and its judgment must be based on a factual foundation, and the agency or officer must give due consideration to all the essential elements involved; and if material elements have not been given due consideration the decision is void."

A proper and sufficient hearing is characterized in 73 C. J. S., Public Administrative Bodies and Procedure, § 132, p. 456, as follows: "An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined."

The conclusion to be drawn from what has been said is that an order of the commission withdrawing existing service from a subscriber which is made without notice and hearing is void. In the light of this, does a carrier have the right, as was done in this instance, without resort to the commission, to withdraw existing service? The answer must be in the negative. It could not reasonably be urged that a carrier could evade the control and supervision over it imposed by the Constitution or statute.

In this view it must be said that inasmuch as there has never been a proceeding the purpose of which was to take away the service of Block, Wilhelm, and Roca, the order in this case so taking it away was erroneous and void. The commission under its supervisory power and jurisdiction of course had the power to order restoration of the service which was withdrawn, and there having been nothing to justify a refusal to do so the dismissal of the complaint was erroneous.

There is no purpose to say by this opinion that the commission shall not, in the future, have the right, on

a sufficient application with due notice and a proper hearing, to determine on the basis of convenience and necessity, the question of continuance or discontinuance of the service which is involved in this action.

The judgment of the commission is reversed.

REVERSED.

IN RE ESTATE OF TONY DUNBIER, DECEASED.
KENNETH L. DUNBIER, APPELLANT, V. J. T. STANTON, EXECUTOR, APPELLEE.
103 N. W. 2d 797

Filed June 10, 1960. No. 34730.

1. **Executors and Administrators: Pleading.** If objections are interposed in the county court to the allowance of a claim against the estate of a deceased person, the issues thus framed will be construed with great liberality in the district court.
2. **Pleading.** A plea of general settlement and payment of all claims and demands is not an implied admission that any specific cause of action existed in plaintiff's favor and against defendant during the time covered by that settlement, and is not inconsistent with a general denial.
3. ———. A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false.
4. ———. An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context.
5. ———. More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other.
6. **Appeal and Error.** An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the Supreme Court.
7. ———. Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal.
8. ———. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.

9. ———. In such a case, it is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
10. ———. In considering sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence.
11. **Trial.** The extent of a party's right to invoke his opponent's failure to call an available witness is to impair the value of the opponent's proof and to give greater credence to his evidence on any issue on which it is shown that the witness might have had knowledge. However, the probative force of any inference arising therefrom is for the triers of fact.
12. **Evidence.** Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony.
13. ———. When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances.
14. ———. The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons.
15. **Trial: Evidence.** Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evidence is equally competent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact.
16. ———: ———. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.
17. ———: ———. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false.
18. **Frauds, Statute of: Evidence.** When a plaintiff seeks to recover

upon an oral contract to devise or bequeath an estate, the burden rests upon him to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.

19. ———: ———. Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight.

20. ———: ———. Each case is to be determined from the facts, circumstances, and conditions as presented therein.

21. **Accord and Satisfaction.** An accord and satisfaction of a claim or demand, whether liquidated or unliquidated, may be, and, where the parties so intend or agree, is effected by the transfer and acceptance of property.

22. **Tender.** Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the debtor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary.

APPEAL from the district court for Polk County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha*, for appellant.

Mills, Mills & Mills, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

This is an action at law seeking to recover upon a claim against the estate of Tony Dunbier, deceased, herein called Tony. The claim was originally filed in the county court of Polk County by Tony's son, Kenneth L. Dunbier, called plaintiff. After a trial in the county court, a judgment was rendered which disallowed and denied plaintiff's claim, whereupon he appealed to the district court for Polk County. Therein

J. T. Stanton, executor of Tony's estate, was and will herein be called defendant. Plaintiff's claim was based in substance upon an alleged agreement with Tony that upon his death plaintiff would receive all property of Tony's estate acquired by farming operations upon certain lands belonging to the parties. Issues were made in the district court by plaintiff's petition on appeal, defendant's amended answer, and plaintiff's reply.

Upon trial to the district court with a jury waived by agreement, a judgment was rendered which found and adjudged the issues generally in favor of defendant and against plaintiff, and denied and disallowed plaintiff's petition and claim with costs taxed to plaintiff. Such judgment also found and adjudged that defendant, as executor, had in his possession certain United States government bonds, series E, having a combined maturity value of $6,500, standing in the name of Tony or plaintiff, and ordered defendant to deliver same to plaintiff upon payment by him of all succession taxes. Thereafter, plaintiff's motion for new trial was overruled and he appealed, assigning some 12 alleged errors which are in substance that the judgment of the trial court was contrary to the evidence and law. We do not sustain the assignments.

Plaintiff's petition alleged in substance that on or about 1931 Tony and plaintiff, who was then about 15 years old, entered into an oral agreement that if plaintiff would quit school, take care of the farming, and turn over to Tony the proceeds therefrom, then upon Tony's death plaintiff would receive all property and estate acquired under said farming operations, and that plaintiff had fully performed all terms of said contract on his part and turned all the proceeds over to Tony. Plaintiff also alleged that in 1936, an 80-acre farm was purchased by Tony from William Dunbier, herein called Bill, which was paid for out of proceeds of the farming operations and an inheritance from plaintiff's grandfather, at which time it was orally agreed

that such farm would be devised to plaintiff upon Tony's death; that thereafter plaintiff continued said farming operations until he was drafted into military service in July 1941; that at that time the parties had accumulated livestock of the value of $8,000 and machinery of the value of $5,000, and Tony owned 293 acres of land, all of which was held by him subject to said agreement; that during said years plaintiff owned a described 80 acres of land upon which Tony made his home, and all income therefrom belonging to plaintiff was likewise turned over to Tony under said agreement; that on or about July 19, 1941, for the purpose of settling up their affairs before plaintiff was drafted, and to provide for future arrangements between them, it was orally agreed between plaintiff and Tony that Tony would live on plaintiff's land, take over the farming operations on his land and that of plaintiff, would dispose of the livestock and machinery, and put the proceeds and all net income from the land into joint government bonds, to be held as such and then paid over to and become the sole property of the survivor; and that to evidence such agreement, they executed a written instrument on July 19, 1941, which provided as hereinafter set forth, and generally designated herein as exhibit No. 1. Plaintiff alleged that upon execution thereof, he departed for military service, and thereafter duly performed the agreement while Tony continued to make his home on plaintiff's land until his death in January 1957; that during his lifetime Tony sold livestock for $8,000, machinery for $4,700, and plaintiff's car for $500; that Tony acquired $45,500 as net rentals from land of the parties, all of which Tony placed in government bonds in the names of plaintiff and Tony, who held same under said agreement; that in December 1954, Tony delivered to plaintiff $9,000 of said bonds, and at time of Tony's death he had $6,500 of said bonds, which are in possession of defendant who has refused to deliver same to plaintiff; and that during 1955 and 1956, Tony cashed

all of said bonds except as heretofore alleged, and received therefrom $42,000, which he converted to his own use in violation of the agreement, and thereby deprived plaintiff, his survivor, of the property. Plaintiff prayed for an accounting of funds and property which should have been put in government bonds, and those purchased and acquired by Tony as well, under the agreement; and prayed for a judgment of $42,000 and that defendant deliver to plaintiff the aforesaid bonds in the sum of $6,500, or upon failure to do so, that plaintiff have judgment for $48,500 and costs.

In his amended answer, defendant specifically denied that Tony ever signed the document which plaintiff alleged had been executed on July 19, 1941; alleged that Tony's signature allegedly attached thereto was a forgery; and alleged that the instrument was drafted many years after July 19, 1941. Also, save and except as specifically admitted, defendant denied every allegation contained in plaintiff's petition. In that connection, defendant admitted that plaintiff quit school about 1931 when 15 years of age, and from that time until he was drafted in 1941, plaintiff assisted Tony in farming a described quarter section of land in Polk County. Defendant alleged that when plaintiff was drafted in 1941, he was and still is the owner of a described 80 acres of land in Polk County, and that Tony was at said time the owner of 293 acres of described land in Polk and York Counties. Defendant admitted that in 1936 Tony purchased a described 80 acres of land in Polk County from Bill, for a consideration of $7,200, but denied that plaintiff furnished any part of such consideration. Defendant admitted that in 1935 Tony purchased a Ford car and gave it to plaintiff, but defendant alleged that in 1942 Tony traded it for another car and in payment therefor purchased a $500 United States government bond, series E, which bond Tony delivered to plaintiff, who accepted it in full payment for his car. Defendant admitted that from July 1941 to December 1954, Tony

managed and collected rentals from plaintiff's described 80 acres of land for plaintiff's benefit, and that in connection therewith, Tony paid all taxes and other expenses of operating plaintiff's land. In that connection, defendant alleged that in November or December 1954, plaintiff engaged in a dispute with Tony regarding and relating to the disposition of Tony's property and the rentals herein described; that plaintiff demanded an accounting for all rentals due him as well as other obligations which plaintiff claimed Tony owed him; that thereupon Tony delivered United States government bonds, series E, having a maturity value of $9,000, to plaintiff in full settlement of all accounts allegedly owing by Tony to plaintiff, who accepted same as full and complete settlement of said accounts. Defendant admitted that he had in his possession as executor United States government bonds, series E, having a maturity value of $6,500, issued in the names of Tony or plaintiff, which bonds became plaintiff's property by reason of Tony's death, and defendant alleged that he is now and always has been ready and willing to deliver said bonds to plaintiff upon payment by him of succession taxes. Defendant prayed for a denial of plaintiff's claim except with relation to said $6,500 of bonds, and for a recovery of costs. Plaintiff's reply denied generally but admitted that he was entitled to the $6,500 of bonds aforesaid.

At the outset we dispose of plaintiff's argument that his ownership of all the bonds involved was admitted by defendant's answer when considered in the light of plaintiff's petition, therefore, plaintiff was entitled to a judgment for the proceeds from all such bonds as a matter of law. We do not agree.

As early as Fitch v. Martin, 83 Neb. 124, 119 N. W. 25, affirmed on rehearing, 84 Neb. 745, 122 N. W. 50, this court held: "If objections are interposed in the county court to the allowance of a claim against the estate of a deceased person, the issues thus framed will

be construed with great liberality in the district court.

"A plea of general settlement and payment of all claims and demands is not an implied admission that any specific cause of action existed in plaintiff's favor and against defendant during the time covered by that settlement, and is not inconsistent with a general denial."

Theretofore, in Cate & Foristall v. Hutchinson, 58 Neb. 232, 78 N. W. 500, this court held that: "A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false."

In O'Neal v. First Trust Co., 160 Neb. 469, 70 N. W. 2d 466, we held that: "An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context."

Also, as held in Giacomini v. Giacomini, 163 Neb. 798, 81 N. W. 2d 194: "More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other."

Plaintiff also argued that all the government bonds here involved, which were issued in the names of Tony or plaintiff, were a gift to plaintiff, and thereafter Tony lacked any power to cash or dispose of them and deprive plaintiff of their ownership, and that such disposition by Tony was a result of his mental incompetency or fraud and undue influence. We do not agree. In that connection, plaintiff's pleadings in this case never raised any such issues. As recently as Lash v. Erisman, 167 Neb. 606, 94 N. W. 2d 32, we held that: "An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the Supreme Court.

"Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal."

In Hild v. Hild, 135 Neb. 896, 284 N. W. 730, this court

said: "One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, *and this contention must be inconsistent with any other theory.*" (Italics supplied.) In that connection, the purported issue of a gift would be entirely inconsistent with plaintiff's theory of contract. In any event, there is no competent evidence in this record that the bonds involved were a gift from Tony to plaintiff, and the evidence, although somewhat conflicting, is overwhelming that Tony was at all times mentally competent and that his disposal of some of the bonds involved during his lifetime was not the result of any fraud or undue influence.

We turn then to rules which are applicable and controlling in this case. In Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132, we held that: "The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.

"In such a case, it is not within the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong." See, also, Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532; Plummer v. Fie, 167 Neb. 367, 93 N. W. 2d 26.

Further, in considering sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence. See, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Reynolds v. Knott, 164 Neb. 365,

82 N. W. 2d 568; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151.

Plaintiff argued that Helen Rafert, plaintiff's sister, as a beneficiary under the last will of Tony, was a real party in interest adversely to plaintiff and defendant, the representative of deceased, but she was not called as a witness by defendant, and, having knowledge of the facts, a presumption existed that her evidence, if produced, would mitigate against her interest.

In Medelman v. Stanton-Pilger Drainage Dist., 155 Neb. 518, 52 N. W. 2d 328, this court said: "The extent of a party's right to invoke his opponent's failure to call an available witness is to impair the value of the opponent's proof and to give greater credence to his evidence on any issue *on which it is shown that the witness might have had knowledge.* However, the probative force of any inference arising therefrom is for the triers of the facts, * * *." (Italics supplied.)

Contrary to plaintiff's contention, there is no showing in this record that Helen had any knowledge of plaintiff's alleged contract, exhibit No. 1, dated July 19, 1941. As a matter of fact, there is no showing that anyone except plaintiff and his brother Bill ever saw or heard of exhibit No. 1, and Bill admittedly had never read it until after Tony's death and plaintiff's claim was filed against Tony's estate. In answer to interrogatories propounded to plaintiff by defendant with regard to exhibit No. 1, Helen was not listed by plaintiff as a person who had any knowledge of exhibit No. 1. Also, contrary to plaintiff's contention, whether or not Tony had given Helen and her husband a start in farming when they were married was entirely irrelevant and immaterial under the issues in this case. The evidence shows that Helen and her husband moved from the home place in 1931, but there is no competent evidence in this record that Helen knew then or thereafter just what the transactions and agreements if any were between Tony and plaintiff, as contended by plaintiff. In

any event, the probative force of any inference arising from Helen's failure to testify for or against plaintiff, her brother, was a matter for the court's determination.

In Leon v. Kitchen Bros. Hotel Co., 134 Neb. 137, 277 N. W. 823, 115 A. L. R. 1078, this court held that: "Justice does not require a court or jury to accept as absolute verity any statement of a witness not contradicted by direct testimony. Circumstantial evidence is equally competent with direct testimony; their relative convincing powers as against each other are for the jury's determination."

In Medelman v. Stanton-Pilger Drainage Dist., *supra,* we held that: "Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony."

In Wert v. Equitable Life Assurance Society, 135 Neb. 654, 283 N. W. 506, quoting from In re Estate of O'Connor, 105 Neb. 88, 179 N. W. 401, 12 A. L. R. 199, this court said: " 'When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances.' " Further, quoting from Bank of Commerce v. McCarty, 119 Neb. 795, 231 N. W. 34, such opinion said: " 'Testimony of handwriting experts that a promissory note offered in evidence is a forgery and does not bear the genuine signatures of the makers thereof, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of witnesses that they saw the note executed.' "

Bank of Commerce v. McCarty, *supra,* also held: "The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons."

In Marston v. Drobny, 166 Neb. 747, 90 N. W. 2d 408, we held that: "Triers of fact are not compelled to ac-

cept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evidence is equally competent with direct testimony. The relative convincing powers of the two classes of evidence are for the determination of the triers of fact.

"Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence.

"Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false."

In In re Estate of Renter, 148 Neb. 776, 29 N. W. 2d 466, we held: "Testimony of handwriting experts that the signature on an instrument offered for probate as a will is not the signature of the alleged testator, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will signed.

"When an issue as to whether the signature on an instrument offered for probate as a will is that of the alleged testator is raised by pleadings and contested by evidence there is no presumption either in favor of witnesses or in favor of circumstances."

In O'Neal v. First Trust Co., *supra,* dealing with oral contracts to devise or bequeath an estate, we held: "The burden in the light of these rules has devolved upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.

"Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof

of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight.

"Each case is to be determined from the facts, circumstances, and conditions as presented therein."

In Meisinger v. Johnson, 162 Neb. 360, 76 N. W. 2d 267, we held that: "An accord and satisfaction of a claim or demand, whether liquidated or unliquidated, may be, and, where the parties so intend or agree, is effected by the transfer and acceptance of property." See, also, Treat v. Price, 47 Neb. 875, 66 N. W. 834, cited with approval in Hileman v. Maxwell, 97 Neb. 14, 149 N. W. 44, wherein this court held: "Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the debtor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary."

Plaintiff argued that being a co-owner of the bonds here involved by contract, Tony held them in trust, and plaintiff could not be deprived of his property rights therein by acts of Tony, therefore plaintiff was entitled to follow the proceeds of the bonds into defendant's hands and recover a judgment therefor. In that connection, as hereinafter observed, the bonds involved, except three which were issued in the name of "Tony Dunbier POD Kenneth Dunbier," and one of which was issued in the names of "Wm. H. Dunbier or Tony Dunbier," were simply issued in the names of "Tony Dunbier or Kenneth Dunbier," and plaintiff premised his case upon his alleged contractual rights, which the trial court's judgment concluded were not sufficiently established by the evidence. In comparable situations, this court and others as well, have concluded that Tony, during his lifetime, having possession of said bonds, could have cashed same without liability to plaintiff for the pro-

ceeds therefrom except and unless plaintiff's interest therein, if any, was established by gift or contract as claimed by plaintiff herein. See, Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711; Nelson v. Rasmussen, 164 Neb. 274, 82 N. W. 2d 418; 91 C. J. S., United States, § 126, pp. 317 and 318, together with authorities cited therein.

In the light of such rules, we have examined the voluminous evidence. Herein we summarize the evidence which has relation to this case as distinguished from Dunbier v. Rafert, *post* p. 570, 103 N. W. 2d 807, a separate equity suit against different defendants, which was consolidated herewith for trial.

During his lifetime, Tony lived on a farm called the home place, which was a quarter section of land located northwest of Gresham in Polk County. His wife died January 14, 1929, leaving as survivors Tony and three children, who are Bill, Helen, now Mrs. Ervin Rafert, and plaintiff. At time of trial Bill lived on plaintiff's 80-acre tract, a part of said home place where Bill was born and where plaintiff was temporarily staying. After the mother's death, Tony, Bill, Helen, and plaintiff lived there together until Bill's marriage in 1930, when he left to farm his own 80-acre tract nearby and a 53-acre tract owned by Tony. Helen married Ervin Rafert in 1930 and they farmed the home place for about a year, then moved to an 80-acre tract owned by Tony in York County, which land is not directly involved in this case. Prior thereto Helen had worked around the house and in the fields on the home place. Meanwhile, plaintiff attended school and started to high school until about 1931 when he quit school at about 15 years of age and began farming with Tony on the 160 acres where his family had always lived. Thus, from 1931 until plaintiff was drafted in July 1941, Tony and plaintiff batched together while Tony managed the home place and plaintiff did most of the farm work. They kept some cattle and horses and had the required farm machinery. In 1934 plaintiff bought the improved 80 acres where

they lived. In that connection, the record is not clear how such land was purchased, but the only logical inference is that plaintiff purchased it with funds derived from the farming operations of plaintiff and Tony. It is admitted that after plaintiff left for military service in July 1941, Bill, with plaintiff's knowledge and permission, took over and farmed in plaintiff's place until Tony was unable physically to carry on, and the livestock and machinery were sold in February 1944.

Tony was proud of plaintiff and pleased with his farming operations, and Bill, as well as others, testified that Tony had told them that plaintiff was supposed to be or was owner of such farm machinery and livestock. However, a former employee of the county assessor's office, who assisted Tony in making out his personal tax returns, testified that all machinery and livestock were always returned as belonging to Tony; that in plaintiff's presence, Tony had told him that he owned the machinery and livestock, which were always assessed in Tony's name; and that only a Ford car, some radio equipment, and poll taxes were ever assessed to plaintiff, except in 1942, while plaintiff was in the army, Tony made a return for him whereon Tony listed a 1936 F-20 steam tractor, and said that it was all the machinery which plaintiff owned.

Bill sold his 80-acre tract to Tony in 1936, after which time such tract was farmed by Ervin Rafert. Where the consideration for such purchase came from is not definitely shown and the evidence does not sufficiently establish that Tony agreed to devise such land to plaintiff. After the sale of his 80-acre tract, Bill moved and worked around the country until 1937 when he returned and worked as a farm hand. Bill admitted that he was placed under guardianship as a spendthrift by the county court of York County in 1939, and that he was still under such guardianship.

Tony executed a will in 1937 wherein he left Bill only $5 because during his lifetime Tony had advanced

Bill various sums of money which Tony thought constituted Bill's share of the estate. Therein he devised a described 80-acre tract of land in York County to Helen. However, such tract was subsequently deeded to Helen on August 15, 1953, by Tony during his lifetime, and such land is not here directly involved. Tony's 1937 will then devised and bequeathed all the residue of his estate to plaintiff because he had been Tony's constant companion and co-worker, had stayed at home, and in every manner had cooperated with Tony in the management of his affairs. That will nominated and appointed Tony's brother-in-law as executor. A codicil, subsequently executed by Tony, reaffirmed his 1937 will, but made plaintiff the executor. In that connection, on November 26, 1956, Tony executed a new will which revoked and cancelled all former wills and codicils; bequeathed $5,000 to Bill; and devised and bequeathed the residue of his estate in equal shares to plaintiff and Helen. That will nominated and appointed Tony's friend and attorney, the defendant herein, as executor because plaintiff was a nonresident. In that connection, Tony died January 6, 1957, when he was 80 years old, and on January 15, 1957, plaintiff, who lived in Spokane, Washington, and had never returned to resume the farming operations with Tony as contemplated by the parties and desired by Tony, was sent a copy of Tony's will by defendant, who, having prepared Tony's last will, notified plaintiff in writing that the will had been filed for probate and that the date for hearing thereon was February 8, 1957, at 2 p. m., at the county judge's office in Osceola. Plaintiff was also told that his father had indicated a time or two before the will was made what he thought he would do; that he thereafter instructed what he wanted put in the will on the date it was made; and that he wanted to change his former will because Helen had the 80 acres which he had left her in his former will and Bill would probably need something for his care as he became older.

Thereafter, on January 21, 1957, a member of a firm of lawyers in Spokane wrote to defendant in plaintiff's behalf, as follows: "Mr. Kenneth Dunbier of this city has contacted this office with reference to the above mentioned estate. Mr. Dunbier feels that he has been discriminated against in the Last Will and Testament and desires that he be furnished a copy of the Inventory and Appraisement in said estate. *He has specifically referred to the fact that the rent on his property, which he received each year, was taken care of by his father and the money used to purchase bonds in the joint names of him and his father.* It is my understanding that this was done for a period of some twenty years and, therefore, a determination should be made of how much of the bonds actually belong to Kenneth. It is our further understanding that the deceased used said bonds to purchase property, which he gave away to his daughter and grandchildren. We would appreciate your informing us of any facts regarding this." (Italics supplied.) However, plaintiff did not contest Tony's last will in any manner, and same was duly probated.

Thereafter, on February 9, 1957, appraisers were appointed by the county court and an inventory of Tony's estate was filed by the executor on March 6, 1957. Such inventory listed 213 acres of described real estate in Polk County, free of all encumbrances, and appraised at $46,000. It also listed personal property appraised at $17,156.72, which included a checking account, a Ford Fairlane 4-door sedan, certain shares of stock, an uncashed check for a dividend, an uncashed check for wheat, some grain on hand in bin, household goods, and certain government bonds standing in the names of Tony or Helen, and Tony or Kenneth. In other words, Tony's estate was appraised at $63,156.72, free of all encumbrances, which, save for certain bonds, and Bill's legacy, plaintiff and Helen took share and share alike.

Thereafter, on May 22, 1957, a member of plaintiff's Spokane firm of lawyers wrote defendant as follows:

"Enclosed is a copy of a Creditor's Claim filed by Kenneth Dunbier in the above-entitled estate. It seems inconceivable to us that Kenneth should not be entitled to something, since his father took all the proceeds from all the farms giving Kenneth nothing for a number of years. The agreement they entered into at the time Kenneth went into service specifically stated that all the balance, after all expenses, taxes, insurance, etc. were paid, was to be placed in U. S. Government Bonds in the joint names of both parties to be given to the survivor upon the death of one. Will you please discuss this matter with Mrs. Rafert and advise us of your position in the matter." In that connection, on the same date such law firm filed a claim against Tony's estate for $49,500. Thereafter, on July 3, 1957, such firm filed a bill of particulars making plaintiff's claim more definite and certain.

During July 1941, plaintiff was drafted into military service, from which he was discharged in October 1945. However, he never returned to farm with his father, who was lonesome, looked forward to plaintiff's return, and wanted him to come back and farm again. As late as early 1954 Tony bought a new farm disc so that plaintiff would have it to use when he returned to farming. As a matter of fact, plaintiff came home only four times between July 1941 and December 1954, after which time he never returned to see Tony again during his lifetime or after his death, claiming that he was ill and could not return for Tony's funeral. Plaintiff did see Tony in 1948 and again in 1952 when Tony went out to Spokane, Washington, for a visit.

When plaintiff and Tony started farming together, Tony owned two 80-acre tracts and one 53-acre tract of land, and by July 1941, plaintiff had acquired the involved 80-acre tract and Tony had acquired the 80-acre tract from Bill, so that plaintiff then owned only 80 acres and Tony owned 293 acres. Bill, at the time of trial, had the benefit of $5,000 bequeathed

to him by Tony in his last will and, according to plaintiff's testimony, Bill had been taken care of also by a will executed by plaintiff. Bill testified at the trial that he witnessed the signing of exhibit No. 1, allegedly executed by plaintiff and Tony on July 19, 1941, but Bill could not remember the date of its execution, and he never read the contract at that time and never saw it again until it was shown to him when his deposition was taken in the present litigation. However, Bill claims that he heard plaintiff and Tony arguing about the fact that while plaintiff was in the service they wanted some contract on their business so that if plaintiff went to the service and died, all plaintiff's money would be put in joint bonds and go to Tony, and if Tony died it would all go to plaintiff, so plaintiff prepared a contract but Tony wouldn't sign because it didn't give him the right to live on plaintiff's land, so plaintiff drew the contract to so provide and Tony signed it with the same pen he did, which was one Bill had sent to plaintiff from Reno, Nevada. Such alleged contract read as follows: "July 19, 1941 Do to me Kenneth L. Dunbier being in the draft and going into the Army, am entering into a partnership contract with my father Tony Dunbier. That all rents money of land owned by Kenneth L. Dunbier and Tony Dunbier be put into joint government bonds and left till either partners death. I Kenneth L. Dunbier also agree to let my father Tony Dunbier live on my farm as long as he desires and operate on these basis. Signed by: Tony Dunbier Kenneth L. Dunbier and on this day of July 19, 1941 Witnessed by: William H. Dunbier Kenneth L. Dunbier."

It will be noted that the witnesses thereto were plaintiff and Bill, both of whom testified that the signature thereon was Tony's. A lawyer, who was also a banker, gave his opinion that the signature appearing on exhibit No. 1 was that of Tony. However, such witness had admittedly been theretofore employed by plaintiff in this case upon a contingent fee basis but had withdrawn in

order to testify, and he explained that he expected to be paid by plaintiff for only services already rendered. He testified that before plaintiff entered the army in 1941, plaintiff and Tony came to his office where Tony said that they had some business interests which they would like to get into the form of an agreement or some arrangement whereby it would be taken care of in case something happened to plaintiff or Tony; that plaintiff had some machinery and livestock; that they had been farming the quarter section in Polk County, and had accumulated some money; that their plan was to put the money in joint bonds so that the survivor would have it; and that the property they had in mind was the quarter section they were farming and the 133 acres in Polk County, but the land farmed by Raferts in York County was not to be involved. The lawyer testified that such arrangement was satisfactory to plaintiff, but Tony had a coughing spell and left the office, so plaintiff was advised to write up something, have Tony sign it, and have it witnessed.

In that connection, however, plaintiff's answer to interrogatories propounded by defendant did not list such lawyer as a person who had any knowledge of facts relating to the alleged contract of July 19, 1941, relied upon by plaintiff, and in May 1957, after plaintiff had filed his claim, such lawyer admittedly told counsel for defendant that he knew nothing about any contract between plaintiff and Tony. It is significant also we believe that there is no testimony that any person except plaintiff had ever seen or heard of exhibit No. 1 from the time of its alleged execution July 19, 1941, until after Tony's death and plaintiff's claim was filed. Further, a sale was had by Tony of all livestock, machinery, and farm equipment on February 18, 1944, with plaintiff's knowledge and permission, as plaintiff instructed, because he might not return to the farm and the sale could be had provided that Tony would put the proceeds in joint bonds as he did plaintiff's car money. In that con-

nection, the lawyer and banker aforesaid admittedly clerked such sale of machinery and livestock which was advertised as " 'Owner, Tony Dunbier' " and such lawyer and banker reported the sale as "Auction sale, Tony Dunbier Owner February 18, 1944." Admittedly, the total received from the sale was only $4,908.70, with a net of $4,712.70 remaining, which sum was deposited on March 16, 1944, in Tony's account by the lawyer banker. A report of the sale as aforesaid was also prepared by plaintiff's cousin and sent to plaintiff, who then wrote to his cousin that he had received such report; that he was glad to hear that everything went so well; to tell Tony that he almost sent him $91.30 to make it an even $5,000; that he thought it was a good deal since he didn't know if he would ever use the stuff; and that he knew how much work it was for Tony to continue on with the farm. In that connection also, only three United States government bonds, having a maturity value of $2,000 and costing $1,500, were bought in the names of "Tony Dunbier or Kenneth Dunbier" or "Tony Dunbier POD Kenneth Dunbier" after March 16, 1944, and during the year 1944, and we find nothing in the record indicating any complaint by plaintiff of Tony's failure to put the sale proceeds into government bonds, although plaintiff's cousin kept him advised of bonds purchased by Tony.

Plaintiff's cousin testified that Tony asked her to write plaintiff and find out what to do with plaintiff's car and plaintiff replied, " 'Better get rid of the car,' " and on April 1, 1942, plaintiff wrote inquiring what his cousin had done with the money from his V-8 coupé and telling her to put it into savings bonds. In that connection, Tony, who had originally given plaintiff the car, traded it in during 1941 or 1942 on another car Tony was buying, and he then bought a $500 United States government bond, issued in the names of "Tony Dunbier or Kenneth Dunbier," and thereafter plaintiff received all $500 bonds so issued in their names during

1942, 1943, and 1944. Plaintiff's cousin wrote letters to plaintiff for Tony while plaintiff was in service, and in turn plaintiff would correspond with his cousin rather than Tony, who would come to her home to learn of any news from plaintiff. She testified that on several occasions Tony told her that his agreement with plaintiff was that he was to look after the place and business; pay all taxes, insurance, and expenses; have a good living; and put what was left in joint bonds. She testified that Tony would buy bonds and bring them over to have her make a list of the serial numbers, and to the best of her recollection all of them were in joint ownership with Tony and Kenneth. As a matter of fact, however, one of such bonds purchased by Tony was issued to "Wm. H. Dunbier or Tony Dunbier." Some were issued to "Tony Dunbier or Kenneth Dunbier." Three were issued to "Tony Dunbier POD Kenneth Dunbier," and some were issued to "Tony Dunbier" only. In December 1951, plaintiff and Tony came to defendant's office to visit and before they left Tony asked defendant, in plaintiff's presence, if it would make any difference in his estate if he transferred some of his bonds to plaintiff so he would have joint title, which to us indicates a then testamentary intent rather than any contractual obligation. They were advised by defendant that it would not affect Tony's estate except that on his death such bonds would go to the co-owner, subject to succession taxes. Thus, on December 28, 1951, 11 bonds originally issued in the name of "Tony Dunbier" were admittedly so reissued in the names of "Tony Dunbier or Kenneth Dunbier." Plaintiff's cousin testified that Tony did not tell her to notify plaintiff when he bought bonds, but when the full list, except the last two entries, was made by her, Tony mentioned that he wanted to send a list to plaintiff, so she copied it and did so.

Of the $46,500 maturity value of government bonds owned by Tony in December 1954, plaintiff was then delivered $9,000 thereof issued in the names of Tony

or plaintiff, and $6,500 maturity value thereof issued to Tony or plaintiff are presently held by the executor. The remaining bonds, having a $31,000 maturity value, all of which were issued to Tony or plaintiff, or Tony POD plaintiff, with one $500 maturity value bond issued to Bill or Tony, were cashed or disposed of by Tony during 1955 and 1956.

After the farm sale held in 1944, the home quarter section, that is plaintiff's 80 acres and Tony's 80 acres, was rented to three parties named Tuepker who farmed it until 1952. There was some trouble about consolidation of schools and Tony refused to tell Tuepkers whether he would rent to them the next year, so they called plaintiff over the telephone, who told them that he left all those decisions to Tony. Thus, in July 1952, Tuepkers received notice to quit, signed by Tony and plaintiff, by Tony his agent.

Helen's three sons, Robert, Don, and Harley, then put in the wheat on the home place in the fall of 1952 and farmed the land on a share basis from that time on except that Robert, who married, moved away and rented other land. The other two boys hauled plaintiff's water and winter fuel, carried water for him, put plumbing in plaintiff's house where Tony lived, overhauled his porch, put down linoleum, put in oil heat, mowed Tony's lawn, drove him to town and elsewhere, went to see him every day to make sure he was all right, shaved him practically all the time, went on trips with him, and they ate their meals together quite often. Tony was afflicted with asthma and growing older, so when he was ill he stayed at the Rafert home. He thought a lot of the boys, his grandsons, saying often that they were fine, thrifty boys, good hustlers, who had always been real good to him, and that he wanted to do something for them during his lifetime.

In the spring of 1955, the three boys contracted to buy the Hines farm in York County for $40,000, but Robert was later released from the contract and the

other two boys began negotiations with the Federal Land Bank for a loan of $20,000. However, when Tony learned about it, he offered to loan such money to the boys. A down payment of $6,000 had been made by the boys at the time the contract was signed. Thus in July 1955, the two boys, their parents, their young sister, and Tony went to the office of John D. Zeilinger in York to settle for the land. John D. Zeilinger was then county attorney, practicing law in York, and represented the administrator of the Hines estate and the heirs thereof, who signed the contract and authorized him to complete the transaction. He is now district judge. In his then office, the boys paid $14,000 of the balance out of their lifetime earnings, and Tony paid the remaining $20,000, taking back a 10-year note bearing four percent interest, and that amount was secured by a mortgage on the Hines farm executed by the boys. That land is not directly involved in this action. There Tony told Zeilinger that he had cashed some bonds and he wanted to help the boys.

Later, Tony's grandsons put down an irrigation well on the Hines farm and purchased necessary irrigation pipe and equipment which were paid for by Tony. Some land leveling was also done on the Hines farm, and because the boys did not have enough money to pay for all of it, Tony paid one-half of the cost. Tony also bought three corn cribs for the boys because he wanted their corn covered. No interest was ever paid by the boys on Tony's $20,000 loan, and on December 10, 1956, he came to see the boys and said he wanted them to drive him to Stromsburg. There they went to the law office of defendant herein who had prepared Tony's will on November 26, 1956, and Tony asked him to prepare a release of the mortgage because he wanted to do something for the boys in his lifetime. He had made comparable statements to several other persons. There the release of the mortgage was executed and acknowledged

before defendant, and same was subsequently filed of record.

We turn then to the evidence relating to the validity of plaintiff's exhibit No. 1, which plaintiff alleged was executed July 19, 1941, and defendant claimed that same could not have been executed, if ever, before February 1955, after plaintiff had allegedly made a complete settlement with Tony in December 1954.

In that connection, a law professor at Creighton University, who was a witness for defendant, qualified as an expert examiner of documents. As such, he examined the instrument dated July 19, 1941, upon which plaintiff primarily relies, and testified that from a comparison of signatures he could not give a conclusion upon whether or not Tony's signature thereon was a true signature. However, he noticed that a glowing fluorescence appeared when ink on the instrument was subjected to ultraviolet light, which indicated that it had the symptoms of R.C. 35, which was an additive put in ink and marketed by Sheaffer Pen Company in February 1955. At the request of defendant's counsel, and with permission of plaintiff's counsel, he then forwarded the instrument to the chief chemist for Sheaffer Pen Company for further examination. Such chief chemist, a witness for defendant, qualified at length as an ink chemist of renown. He had been graduated from Trinity College with a major in chemistry, had received his Masters degree the following year, and had attended graduate school at Columbia University for further study in chemistry. He had written numerous important articles for publication, including the chapter "Writing Ink" appearing in the Encyclopedia Britannica, and he had received distinguished service awards in the field of such chemistry. He testified that as early as 1940 he conceived the idea of finding a substance to put in ink which would fluoresce and leave a visible mark on paper fiber after the writing had been solubly eradicated, and that he then proceeded to investigate and ex-

periment with synthetic dyes and fluorescent substances known to be soluble, but found no substance that had the necessary properties. In the mid and late 1940s other chemicals came upon the market, so he experimented with those substances and investigated and examined all inks on the market, but never found any ink that had the properties he had theretofore conceived. Finally, he was able to find an efficient combination of substances which, put in ink, would fluoresce and leave a visible mark on paper fiber after the writing had been solubly eradicated. Thus, in February 1955, such substance, called R.C. 35, was first put in ink and placed on the market. He testified that as a result of his examination of the ink on plaintiff's exhibit No. 1, it was inevitable that it contained R.C. 35, which was not available in 1941, and that the document could not have been written until after 1955. He testified that each of the purported signatures fluoresced as it did when ink contained R.C. 35, and that the alleged signatures of Tony and plaintiff were written with a different pen, which is supported by a casual examination of a photostat of the document appearing in evidence. In that connection, also, such chemist performed an experiment and analysis of the ink on exhibit No. 1 in open court, which demonstrated that the writing fluoresced under ultraviolet light, and upon soluble eradication, left visible marks on the paper fiber exactly like R.C. 35 would do. Such chemist also made like experiments in open court upon two exhibits offered in evidence by plaintiff. One such exhibit was purportedly signed by Tony on April 7, 1932, and the other exhibit was a letter written by plaintiff to his cousin on March 6, 1944. Such experiments demonstrated that the ink and writing on neither exhibit fluoresced in any manner.

One witness was called by plaintiff who qualified as a chemist and expert in connection with disputed documents. He testified that he had studied inks and compounds and their manufacture and traits which varied

in their composition. He had examined exhibit No. 1 and observed a fluorescence of the ink in general and a different type in areas of eradication. However, he testified that in order to determine what compounds were contained in the ink and whether it fluoresced after eradication, it would be necessary to remove all ink from the document and then there would probably not be enough, and he could not give an opinion whether it was written with ink containing R.C. 35. In that connection, it is significant that although he testified that he had served as an expert witness in enumerated disputed document cases, he did not testify herein to the validity of Tony's purported signature on the document involved. As we view it, the evidence, facts, and circumstances with regard to the validity of exhibit No. 1 and the date of its alleged execution, if ever, was conflicting and a question for determination by the court. In that connection, plaintiff, assuming that the signatures thereon were genuine, argued that exhibit No. 1 could not have been executed by the parties in 1955 or thereafter because Tony and plaintiff were never together after December 1954. However, if exhibit No. 1 were a forgery as to time or execution, there certainly was no necessity that they should be together in 1955.

In any event, defendant contended that in December 1954, plaintiff had a complete settlement of rentals and all other obligations which plaintiff then claimed were due him from Tony, by delivering to plaintiff United States bonds having a maturity value of $9,000, which plaintiff accepted in full settlement. In that connection, exhibit No. 1 contains no provision that Tony was to look after the place and business, pay all taxes, insurance, and expenses, and have a good living, and what was left would then be put in government bonds, as contended by plaintiff. Also, under the facts and circumstances presented herein, plaintiff's alleged agreement could have been intended to be operative only

while plaintiff was in the army, and same could as well have applied only to the rents from plaintiff's 80-acre tract as suggested by plaintiff's Spokane attorneys on January 21, 1957.

Be that as it may, plaintiff testified that in December 1954, when he visited Tony, he told plaintiff that he had deeded Helen the 80 acres in York County, and that the $9,000 in bonds were given to plaintiff in order to pacify him because thereof, and that there was no settlement made at that time. Plaintiff admitted that he received $9,000 in bonds at that time, but testified that Tony just reached in his safe deposit box and, without counting or checking the bonds, handed them in a bunch to plaintiff and told him to do as he liked with them. In that connection, it will be remembered that the 80 acres deeded to Helen was the same land which had been devised to her by Tony's 1937 will which plaintiff testified he had seen, although that was denied by other evidence, and such land was admittedly not included in plaintiff's claimed agreement with Tony.

On the other hand, after receiving the $9,000 in bonds, plaintiff was taken by Tony, Helen, her husband Ervin, and their son Don to the depot at Columbus so that plaintiff could catch a train and return to Spokane. While waiting there, Ervin told plaintiff, " 'Now, Kenneth, I don't care, it's none of my business how much you have got in your settlement, but I would like to know how you arrived at a figure,' " to which plaintiff replied "that they had taken the number of acres into the number of bonds and divided it and arrived at a figure * * * 'I have made a complete settlement with my father' * * * 'I have got all my rent so far. I have got all my rent.' " Don also heard his father Ervin jokingly tell plaintiff that " 'Usually prospectors come out of the hills with money. I hear you are taking money back into the hills,' " meaning to Spokane, Washington. He also heard his father say, " 'Kenneth, I'm not interested in finding out how you got paid your rent; as far as

the amount, I'm not a bit interested in knowing how much you got; but I'm curious to know how you arrived at a figure on your rent,' " to which plaintiff replied, " 'Yes; I will tell you.' " However, not being interested, Don then walked away and did not hear the rest of his father's conversation with plaintiff. Plaintiff denied that he had any such conversation. In that connection, however, a near neighbor who had known and visited with Tony many different times, testified that a day or two after plaintiff had left for Spokane, he was at Tony's place and visited with Tony, whereat "He said at that time he had settled with * * * Kenneth."

We believe there is ample evidence in this record to support a finding that in December 1954, when plaintiff received the $9,000 of bonds from Tony, which included the $500 bond for plaintiff's car, he accepted them in full settlement of the rents and other obligations which were then in dispute. In that connection, plaintiff claims in any event that the trial court should have permitted plaintiff to recover a balance of rents due him from his land during 1955 and 1956. However, the evidence with relation thereto and with regard to taxes, insurance, and expenses paid at all times by Tony, was so incomprehensible as to be wholly insufficient to support any finding or determination by the trial court that plaintiff was entitled to recover any balance of rents on his land for 1955 and 1956.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed.

AFFIRMED.

KENNETH L. DUNBIER, APPELLANT, V. HARLEY D. RAFERT ET AL., APPELLEES.

103 N. W. 2d 814

Filed June 10, 1960. No. 34731.

1. **Appeal and Error.** Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal.
2. **United States.** The ownership of United States savings bonds, series E, is governed by the United States law and treasury regulations which provide that during the lives of both co-owners the bonds will be paid to either co-owner upon his separate request without requiring the signature of the other co-owner; and upon payment to either co-owner the other person shall cease to have any interest in the proceeds of the bonds except and unless such interest is established by contract or gift.
3. **Pleading.** A plea of general settlement and payment of all claims and demands is not an implied admission that any specific cause of action existed in plaintiff's favor and against defendant during the time covered by that settlement, and is not inconsistent with a general denial.
4. ———. More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other.
5. **Cancellation of Instruments.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.
6. ———. In order to set aside a written instrument for want of mental capacity on the part of the person executing such instrument, the burden of proof is upon the party so asserting it to establish that the mind of the person executing such instrument was so weak or unbalanced when the instrument was executed that he could not understand and comprehend the purport and effect of what he was doing.
7. **Gifts.** This jurisdiction recognizes the right of an owner of real or personal property to make a gift of it inter vivos, without consideration.
8. ———. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a

delivery by the donor and acceptance by the donee.

9. **Evidence.** Testimony of handwriting experts that a written contract offered in evidence is a forgery and does not bear the genuine signatures of the makers thereof, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony that such signatures were genuine.

10. ———. The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons.

11. ———. The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action.

12. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

APPEAL from the district court for Polk County: H. EMERSON KOKJER, JUDGE. *Affirmed.*

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha,* for appellant.

Mills, Mills & Mills, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action in equity brought in the district court for Polk County by Kenneth L. Dunbier, as plaintiff, against Harley D. Rafert and Don L. Rafert, defendants. The purpose of the action was to require an accounting from the defendants to the plaintiff for the proceeds of certain United States savings bonds, series E, which the plaintiff contends he owns, and to impress a lien on real estate belonging to the defendants acquired with the proceeds of such bonds alleged to have been

wrongfully converted and received by the defendants without consideration. The trial court found generally in favor of the defendants and against the plaintiff, and that Tony Dunbier was not incompetent as alleged by the plaintiff and not controlled by undue influence as alleged by the plaintiff. The court further found that the alleged partnership between the plaintiff and Tony Dunbier was not established by the evidence, and denied the plaintiff's petition. Judgment was rendered in accordance with the above findings. The plaintiff filed a motion for new trial which was overruled. From the order overruling the plaintiff's motion for new trial, the plaintiff appealed.

The plaintiff's petition alleged that on or prior to July 15, 1955, he was the owner, in partnership with Tony Dunbier, of certain United States savings bonds, series E, of an aggregate cash value in excess of $37,500; that the plaintiff's ownership of said bonds was known to the defendants; that it was part of a partnership agreement between the plaintiff and Tony Dunbier that said bonds would belong in full to the survivor of Tony Dunbier and the plaintiff, which fact was well known to the defendants; that on or about July 14, 1955, Tony Dunbier cashed bonds in the principal sum of $20,000, and loaned said amount to the defendants to be used by them for the purchase of certain real estate; that the defendants knew of plaintiff's ownership of said bonds; that to evidence said loan defendants executed and delivered to Tony Dunbier their mortgage deed thereby agreeing to repay the loan within a period of 10 years with interest at the rate of 4 percent per annum; that the mortgage was duly recorded; that although the mortgage and the indebtedness evidenced thereby were by defendants executed, payable in the name of Tony Dunbier, defendants knew at all times of the plaintiff's ownership and his right to the money so borrowed by them; that on or about December 10, 1956, at which time there was still due from the defendants upon said mortgage

indebtedness the sum of $20,000 and interest in the amount of $1,124.44, the defendants prevailed upon Tony Dunbier, for no consideration, to execute and deliver to them a release of said mortgage, with full knowledge on defendants' part that the mortgage loan was made to them with funds belonging to the plaintiff; that Tony Dunbier had no right or authority to release the mortgage without full payment thereof; that at the time of the procurement of the release by the defendants, Tony Dunbier, the grandfather of the defendants, was under complete domination and control of the defendants and their mother, Helen Rafert; that said release was procured by the defendants through and by the exercise of duress and undue influence on the part of the defendants and their mother; that in further continuance of said conspiracy the defendants, during 1956, procured Tony Dunbier to cash additional bonds belonging to the plaintiff in the amount of $10,000, and to advance the $10,000 to the defendants for the purpose of improving the real estate as aforesaid; that the defendants failed to make any repayment for the advancements which went into and enhanced the value of the real estate belonging to the defendants; that Tony Dunbier died in January 1957, and thereupon the plaintiff became the sole and absolute owner of said bonds and all of the proceeds therefrom; that the plaintiff was entitled to have the release of the mortgage set aside; that the plaintiff was entitled to have a lien impressed on said real estate for the advancement of the $10,000 representing the proceeds of the bonds; and that the plaintiff was entitled to an accounting from the defendants for the proceeds of all of the said bonds. The prayer of the petition was in accordance with the above.

The defendants' amended answer admitted that on or about July 14, 1955, Tony Dunbier, the grandfather of these defendants, loaned them $20,000 in consideration for which these defendants delivered to Tony Dunbier their promissory note in the amount of $20,000,

payable in 10 years and bearing interest at the rate of 4 percent per annum; that such amount was received and used by defendants to purchase certain real estate; that said note was secured by a mortgage on the real estate so purchased; that no payment had been made on said obligation, but that on or about December 10, 1956, Tony Dunbier released said mortgage and canceled the indebtedness which the same secured, as a gift to these defendants; that Helen Rafert was the daughter of Tony Dunbier and the mother of these defendants; that Tony Dunbier died during January 1957; and that Tony Dunbier paid for certain improvements to the real estate owned by these defendants. The defendants alleged that said improvements were made with funds belonging to Tony Dunbier and were made as a gift to these defendants. The defendants further alleged that prior to July 1955, Tony Dunbier operated or managed certain real estate belonging to the plaintiff, collecting the income therefrom and paying taxes and certain other expenses incurred in connection therewith; alleged that these defendants lacked information sufficient to form a belief as to the arrangements the plaintiff and Tony Dunbier had in regard thereto; and denied the plaintiff's allegation of a partnership agreement relating thereto. The defendants further alleged that if a contract was made upon the terms as alleged by plaintiff, the consideration running from the plaintiff to Tony Dunbier was so grossly inadequate that a court of equity would not permit the plaintiff to receive the benefits therefrom; that Tony Dunbier and the plaintiff had a dispute about the indebtedness of Tony Dunbier to the plaintiff, including certain income from the real estate belonging to the plaintiff; that thereupon Tony Dunbier delivered to the plaintiff certain United States government bonds of the maturity value of $9,000 in full settlement of all the indebtedness owed by said Tony Dunbier to the plaintiff, including the income from the plaintiff's real estate held by Tony Dunbier; and that

said bonds were received by the plaintiff in full satisfaction of said indebtedness. These defendants specifically denied that the plaintiff had any interest in the funds loaned to them or used by Tony Dunbier for and in behalf of these defendants. The defendants specifically denied that the funds were procured by undue influence, but alleged they were a gift the defendants received from Tony Dunbier. The defendants further alleged that the document on which plaintiff relied as a partnership contract between him and Tony Dunbier was a forgery. The prayer was for denial of the plaintiff's petition.

The plaintiff's reply denied all allegations of the defendants' answer not admitted, and for further reply alleged that on or about December 10, 1956, and some time prior thereto, and at the time of the execution of the release of the mortgage on behalf of the defendants, Tony Dunbier was not of sound mind and was mentally incompetent; and that such release and cancellation were procured by the defendants and their mother, Helen Rafert, by the exercise of undue influence upon Tony Dunbier.

The record shows that during his lifetime Tony Dunbier lived on a farm in Polk County. His wife, Gertrude, died on January 14, 1929. She left surviving her a husband, Tony, and three children, William H. Dunbier, Helen Dunbier, and Kenneth L. Dunbier. Tony Dunbier died on January 6, 1957. At that time he was 80 years of age.

We will refer to Tony Dunbier as Tony; to William H. Dunbier as Bill; to Kenneth L. Dunbier as Kenneth, or plaintiff; and to Helen Dunbier Rafert as Helen.

Helen married Ervin Rafert in 1930. She had three sons, two of whom are the defendants Harley D. Rafert and Don L. Rafert, the grandsons of Tony. Bill was the oldest Dunbier child and Kenneth the youngest. Kenneth completed the eighth grade in school. Tony owned 80 acres of land in Polk County which adjoined 80 acres

owned by Kenneth. Kenneth acquired title to his 80 acres of land on May 3, 1934. Tony also owned a separate 53 acres of land in Polk County and 80 acres of land in York County. In 1936, Tony bought 80 acres of land which Bill owned. Kenneth was between 11 and 12 years old when his mother died. Helen and Ervin lived on the home place for a year or two after their marriage, then moved to a farm in York County owned by Tony. There is testimony to the effect that Helen could not get along with Tony. Bill was married in 1930, and left the home place.

From 1931 until July 1941, Tony and Kenneth batched together on the 160 acres of land above mentioned. The other land owned by Tony was farmed by the Raferts during the period from 1931 to July 1941, when Kenneth was called into military service. Kenneth did most of the farm work. Tony and Kenneth kept livestock on the farm, farmed with horses, and had a full line of machinery. Tony was pleased with Kenneth's farming, bragged about Kenneth, and was proud of him.

Bill testified that Tony told him that Tony had started Bill out in farming, and also Helen, and that he was starting Kenneth out. He also told Bill that the machinery and livestock belonged to Kenneth.

Tony, on numerous occasions, told Iris Dey that the "whole thing" was Kenneth's.

A former employee of the Polk County assessor's office, who assisted Tony with his personal tax return, testified that the machinery and cattle were assessed in Tony's name; that Kenneth possessed a Ford automobile, a radio, and was assessed for poll tax; that Kenneth was present when Tony told this witness that he owned the machinery and livestock; that in 1942, when Kenneth was in the army, Tony signed a tax return "Kenneth Dunbier by Tony Dunbier"; and that on the 1942 tax return there appeared a 1936 F-20 steam tractor belonging to Kenneth, which was all the machinery Kenneth owned, according to Tony. The machinery

and livestock were always turned in in Tony's name. Tony paid the taxes on his land and on Kenneth's land. Tony also paid the insurance premiums on the improvements on both his land and Kenneth's land.

Bill was placed under guardianship in April 1939, by proceedings in the county court of York County, on the ground that he was a spendthrift.

On June 19, 1937, Tony made a will in which he gave Bill $5, Helen an 80-acre tract of land in York County, and the remainder of his estate to Kenneth, "* * * for the reason that my son has been my constant companion and coworker and has stayed at home with me, and in every manner has cooperated with me in the management of my affairs, and it is my wish that he have all of the balance of my estate other than specifically devised and bequeathed heretofore." This will was reaffirmed by a codicil drawn in 1953.

On November 26, 1956, Tony made a new will revoking and canceling any and all former wills and codicils to wills made by him. He had come to the conclusion that he desired to do something for Bill, so in his last will and testament he made a bequest to Bill in the amount of $5,000, and left all the remaining balance of his property to be divided equally between Helen and Kenneth.

Bill testified that he heard Tony and Kenneth talk about a contract to the effect that in the event Kenneth was killed Tony would receive the money, or in the alternative, if Tony should die, Kenneth would receive the money resulting from the farming endeavors. For this purpose, Tony and Kenneth were going to the Gresham bank and have a lawyer prepare a contract. They contacted the lawyer. This lawyer testified that Tony told him that Kenneth was going into the service and that Tony and Kenneth had business interests and wanted an agreement drawn; that the arrangements were that Tony had started Kenneth in farming; that there was some machinery and livestock, and some

money had been accumulated; and that the plan was to take the money and put it in government bonds so the survivor would have the bonds. Tony also told this witness that the income from the property was from the 160 acres that he and Kenneth owned and were farming, and 133 acres in Polk County. Kenneth said such an arrangement was satisfactory to him. At that time Tony developed a violent coughing spell and had to leave, and he did not return for the purpose of making the contract. This witness told Kenneth to write up an agreement, have Tony sign it, and have it witnessed. On cross-examination this witness testified that he remembered visiting with defendants' counsel with reference to this matter in May 1957; and that defendants' counsel asked him if he knew anything about a contract or agreement between Tony and Kenneth and he said that he did not know of any such contract.

The alleged contract is as follows: "Do to me Kenneth L. Dunbier being in the draft and going into the Army, am entering into a partnership contract with my father Tony Dunbier. That all rents money of land owned by Kenneth L. Dunbier and Tony Dunbier be put into joint government bonds and left till either partners death. I Kenneth L. Dunbier also agree to let my father Tony Dunbier live on my farm as long as he desires and operate on these basis. Signed by: Tony Dunbier Kenneth L. Dunbier and on this day of July 19, 1941 Witnessed by: William H. Dunbier Kenneth L. Dunbier."

Bill and Kenneth testified that the signatures on the agreement were genuine, as did the banker in the Gresham bank where Tony had a checking account. Other signatures of Tony were introduced for comparison purposes.

Bill testified that Tony and Kenneth argued because the first contract that was made between them did not permit Tony to reside on Kenneth's 80 acres where the

improvements were located, and Tony refused to sign such an agreement.

Gladys Linton, a cousin of Kenneth, testified that Tony would buy bonds in the joint names of Kenneth and Tony, and bring them to her. She would put down the serial numbers every time Tony brought bonds to her, and make a record of the bonds. She further testified that to the best of her recollection all of such bonds were in the joint names of Kenneth and Tony. After she compiled a list and put the numbers down, she would give the bonds back to Tony. Tony desired that a list of the bonds be sent to Kenneth, and she sent Kenneth such a list. Kenneth testified that Gladys Linton wrote him and gave him the serial numbers of the bonds that Tony purchased, commencing with the time Kenneth was overseas. From this information Kenneth compiled a list of the bonds. After Kenneth left for military service, Tony told Gladys Linton that he was to look after the place and the business, pay all of the taxes and insurance, have a good living, and what was left would be put into joint government bonds.

After Kenneth left for military service, Bill farmed the land for about 2 years, then a farm sale was had of all the machinery and livestock on the place.

Gladys Linton testified that prior to the sale, farming was getting to be too much for Tony and he asked her to write and ask what Kenneth thought about having a sale. She wrote to Kenneth and received a reply in which Kenneth consented to a sale because things were selling high; he said that it would probably be the best thing to do as he did not know if he would get back from the war, and if he did get back he did not know whether he would farm; and that his father had his word to sell, providing the money from the sale was put into government bonds.

With reference to Kenneth's car, he wrote and told Tony to get rid of it. Tony traded Kenneth's car on a car he was buying in 1941 or 1942, and purchased a

$500 government bond issued in the names of Tony or Kenneth.

A farm sale was held in February 1944. This sale was advertised in Tony's name as owner of the items to be sold. A report of the sale listed the purchasers and the property sold. The sale netted $4,712.70, which was deposited to Tony's account on March 16, 1944, in the Gresham State Bank. Gladys Linton prepared a report of the sale from information she obtained from Tony, and forwarded the same to Kenneth. Kenneth replied that he had received the results of the sale, was pleased with the same, and said that he did not know if he would ever use the stuff, and knew how much work it was for his father to continue on.

The record shows that certain United States government bonds, series E, were acquired by Tony in the maturity value of $46,500. One bond was issued to William H. Dunbier or Tony Dunbier. Eleven of such bonds, originally issued in Tony's name, of a maturity value of $9,000, upon Tony's application were reissued in the names of Tony Dunbier or Kenneth Dunbier, in 1951. It appears that in December 1954, all of the government bonds, with the exception of one issued in the name of William H. Dunbier or Tony Dunbier, were either issued as Tony Dunbier or Kenneth Dunbier, or Tony Dunbier, POD Kenneth Dunbier. Taking such bonds at their maturity value which was $46,500, $6,500 remained in Tony's safe deposit box, $9,000 had been given to Kenneth, and the balance of $31,000 were cashed by Tony as follows: $18,000 on July 14, 1955; $3,500 on April 10, 1956; $6,500 on May 9, 1956; $2,000 on September 18, 1956; and $1,000 on November 28, 1956. We will consider the bonds as above set forth in connection with other evidence in the case.

While Kenneth was in military service, he was home on sick leave in 1943 or 1944. He also saw Tony in 1945. He was sent to Spokane, Washington, and in 1948 Tony visited him there. Tony also visited him in

Spokane in 1953. Kenneth visited Tony in Nebraska in December 1951 and in December 1954.

Gladys Linton testified that after the last time Kenneth visited home she talked to Tony about Kenneth, and his feelings toward Kenneth had not changed. Kenneth thought that his father would like to have him return to the farm. Iris Dey testified that Tony was very lonesome when Kenneth was gone to the army, and looked forward to his coming back. Kenneth never returned home to farm. He made his residence in Spokane, Washington.

In August 1953, Tony discussed the matter of transferring certain real estate to Helen with his attorney. This was the 80 acres of land in York County which he had previously devised to Helen in his will made in June 1937. The purpose of transferring the land was to enable Helen's daughter to attend a school in York County. Papers were prepared, consisting of a deed from Tony to Helen dated August 15, 1953, and a real estate mortgage from Helen to Tony. The consideration shown in the deed was $11,680. There was also prepared a release of the mortgage, and a quitclaim deed from Helen and her husband to Tony. The attorney understood that this was a temporary matter. Later Tony informed the attorney that Helen and Ervin Rafert were buying the 80 acres of land and there would be no further need for the mortgage, the release of the same, or of the quitclaim deed. As a consequence, these instruments were delivered to the Raferts.

Kenneth testified that when he visited Tony in December 1954, Tony told him that he had given Helen the 80 acres of land in York County, and that he had to do this in order to enable Helen's daughter to go to school in York County. At that time Tony gave Kenneth bonds of the maturity value of $9,000, as heretofore mentioned, and told Kenneth: "I want you to have these before I die, some of our bonds. I want

you to have some of our bonds before I die. I feel if I turn that land to Helen she may not give it back."

After Kenneth had received the bonds of the maturity value of $9,000 in December 1954, he was taken to the depot in Columbus to meet a train for the purpose of returning to Spokane. Ervin, Helen, and Don Rafert, and Tony took Kenneth to Columbus. While waiting for the train, Ervin visited with Kenneth and stated that it was none of his business how much Kenneth got in the settlement made by Tony with him, but he wondered how they arrived at the figure. Kenneth told Ervin that they had "taken the number of acres into the number of bonds and divided it and arrived at a figure." Kenneth stated that he had received his rent.

Don Rafert testified that he was present at that time when his father commented to Kenneth in a joking manner that: "Usually prospectors come out of the hills with money. I hear you are taking money back into the hills." He also heard his father ask Kenneth about the settlement that was made between Kenneth and Tony, and Kenneth said that he would tell Ervin about it. This witness, not being interested, then walked away. At that time this witness was 19 or 20 years of age.

George H. Bond, who was acquainted with Tony during his lifetime and visited him on occasions, testified that a day or two after Kenneth had returned to Spokane he visited with Tony at Tony's home. Tony told this witness that he had made a settlement with Kenneth.

After the farm sale, which was held in 1944, the 160 acres owned by Tony and Kenneth were rented by John, Elmer, and Paul Tuepker, and they farmed it until 1952. Due to some difficulty relating to consolidating of schools, Tony would not commit himself as to whether he would lease the land to these tenants for the following year. Elmer Tuepker called Kenneth by telephone and received a reply that Tony was managing

the place and making the decisions with reference to what should be done in renting it. In July 1952, the Tuepkers received notice to quit the premises, signed Kenneth Dunbier by Tony Dunbier, his agent. Robert, Don, and Harley Rafert planted wheat on this land in 1952, and farmed it from that time on. Robert got married and moved to Shelby to rent other land.

The record shows that Don and Harley Rafert helped Tony in many ways. They brought fuel to his home, helped overhaul his porch, fixed a drain in his home, laid linoleum, mowed his lawn, drove him to town to transact business, and would shave Tony most of the time. Often Tony and the Rafert boys would eat out, and Tony would pay for their meals, and sometimes Tony paid for their services. In 1952, Don drove Tony to Tucson, Arizona, for a vacation trip, and Tony paid all of the expenses.

The record further shows that Tony thought very much of the Rafert boys. He said they were thrifty and good hustlers. He always spoke well of the boys and said that they had been real good to him and came over every day to see how he felt.

In the spring of 1955, Robert, Don, and Harley Rafert entered into a contract to purchase the Hines farm. Robert was later released from the contract. The purchase price of the Hines farm was $40,000. Don and Harley Rafert had arranged for a loan with the Federal Land Bank, and a down payment of $6,000 was made when the contract was signed. When Tony heard that the Rafert boys were about to purchase the Hines farm he offered to loan them the money. In July 1955, Don and Harley, their parents, and Tony went to the office of an attorney in York for the purpose of making a settlement for the Hines farm. Don and Harley paid $14,000 on the balance, and Tony paid $20,000. In return, Tony took a note from the Rafert boys in the amount of $20,000, bearing interest at 4 percent per annum, and a mortgage was drawn for a period of 10

years securing the same, which was given by the Rafert boys. At that time Tony told the attorney that he had cashed some bonds because he wanted to help the boys. The cost of drawing the note and mortgage was paid by the Rafert boys, and no interest was paid on the mortgage by the makers. The mortgage was placed of record July 15, 1955. After the boys had purchased the Hines farm, an irrigation well was put on the place, pipe was purchased, and land leveled. Tony had a conversation with the boys as to how much they could pay, and said he would pay the rest of the cost of the land leveling. Tony also purchased some corncribs because he wanted the corn covered. The amount advanced by Tony in April 1956 for the above items appeared to be as follows: For the leveling of the land $900; for the corncribs about $1,000; and $5,323 for irrigation equipment and pipe.

Late in 1956, Tony told Harley Rafert that he and Don had done a lot for him and he was going to give them the Hines farm. On December 10, 1956, Tony contacted Don and Harley and wanted them to drive him to Stromsburg. Arriving at Stromsburg, Tony contacted his attorney, and requested the attorney to draw a release of the mortgage on the Hines farm. Prior to that time, on November 26, 1956, Tony executed his last will in this attorney's office, and at that time he told his attorney that he wanted to do something for the Rafert boys and would do it in his lifetime. The release was executed and acknowledged before the attorney.

Foy Rosenberry testified that Tony told him he was going to give his share of the Hines farm to the boys because they had been good to him. Tony told Alva Hecht that he was going to see to it that the boys were taken care of.

There is evidence in the record offered by the plaintiff to the effect that Tony, in his later years, and especially in the year 1956, was mentally incompetent to

transact business, was under the influence of Helen and the Rafert family generally, and was unduly influenced in cashing bonds and assisting the Rafert boys in the manner as heretofore set out. We have examined this record and find that there is an abundance of competent evidence that Tony was mentally competent in assisting the Rafert boys as heretofore shown. In addition, Tony was mentally competent to make his last will and testament in November 1956. The witnesses who testified with reference to the negotiations involving the Hines farm, the last will and testament of Tony, and the cashier of the Stromsburg bank who cashed bonds for him, testified that he was mentally competent at all times. There is evidence to the effect that there was no change in Tony's mental condition although physically he might have been weaker.

The plaintiff contends that, being a co-owner of the bonds in suit, he could not be deprived of his property rights therein through the acts of his co-owner, therefore, he was entitled to follow the proceeds of the bonds into the hands of the defendants who had received the same without consideration.

The bonds in question were registered in the names of Tony Dunbier or Kenneth Dunbier. The words "or survivor" were not used. Three of the bonds were listed Tony Dunbier or Kenneth Dunbier POD, meaning payable on death.

The plaintiff asserts that no matter how the co-ownership occurred, whether by gift or by contract, it did not lie within the legal capacity of Tony to deprive the plaintiff of his co-ownership rights by cashing the bonds and turning the proceeds over to the defendants.

The plaintiff, in his pleadings, alleged that he acquired these bonds pursuant to a partnership agreement. It appears that in this court he also contends that the bonds were acquired by Kenneth as a gift from Tony. It is apparent that the plaintiff has injected a theory other than that which he pleaded and presented to the

trial court, and is now asking this court to consider, in addition to Kenneth acquiring the bonds by a contract, whether or not Tony made a gift of the bonds to Kenneth.

In the case of Callahan v. Prewitt, on rehearing, 143 Neb. 793, 13 N. W. 2d 660, this court said: "Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal." See, also, Lash v. Erisman, 167 Neb. 606, 94 N. W. 2d 32.

With reference to the bonds of the type here being considered, this court in Rohn v. Kelley, 156 Neb. 463, 56 N. W. 2d 711, considered series G government bonds which were made out to Mrs. Florence Hendricksen or Mrs. Ethel Kelley. In other words, they were co-owners of bonds which had a maturity value of $10,000. Ethel Kelley cashed six of the bonds prior to the death of Florence Hendricksen and four thereafter. This court said: "The government's interest is a contractual one. Its obligation was to pay either of the co-owners the amount agreed upon as shown by the bonds upon their proper presentation, in compliance with the federal law." Series G and series E government bonds fall into the same category, as each series are savings bonds.

In Littlejohn v. County Judge, Pembina County, 79 N. D. 550, 58 N. W. 2d 278, 39 A. L. R. 2d 690, the court was considering United States savings bonds, series E and G, registered in the names of two persons as co-owners. The court said: "Savings bonds of the series involved in this case may be registered in the names of two persons as co-owners and, * * * a bond so issued will be paid to either co-owner upon his request without the signature of the other."

In Yocum v. Yocum, Com. Pl., 46 Sch. Leg. Rec. 164 (Pa.) it was said that ownership of series E bonds (series E bonds are the ones considered in the instant case) is governed by United States law and treasury

regulations, which provide that during the lives of both co-owners the bonds will be paid to either co-owner upon his separate request without requiring the signature of the other co-owner, and upon payment to either co-owner the other person shall cease to have any interest in the bond. See, also, Paulsen v. Paulsen, 144 Me. 155, 66 A. 2d 420; Ruben v. Ruben, Com. Pl., 95 Pittsb. Leg. J. 65; 91 C. J. S., United States, § 126, p. 316.

In order to be entitled to the proceeds of the bonds in question, the plaintiff has the burden to prove by a preponderance of the evidence that he was entitled to such proceeds by virtue of a contract between Tony and Kenneth.

The plaintiff contends that the existence of the contract alleged by plaintiff and plaintiff's ownership of the bonds in suit were admitted by the defendants' pleadings.

The defendants' answer stated in substance that they lacked information sufficient to form a belief as to the nature of the arrangement that the decedent and the plaintiff had in regard to the plaintiff's rent. The answer then specifically denied the plaintiff's allegations in his petition relating to the partnership agreement or contract. The answer also stated that if a contract had been made on the terms alleged by plaintiff, the consideration running from the plaintiff to the decedent would be unconscionable, and a court of equity would not enforce it. By the amended answer, the defendants alleged that the written contract upon which the plaintiff relied as a partnership agreement was a forgery.

The contract alleged by the plaintiff was purported to be between the decedent and the plaintiff. The defendants would not know about the contract or the details of the same, nor could they be expected to know what it contained. All they knew was that the plaintiff claimed under a contract.

The plaintiff also argued that the defendants admitted

the contract by pleading that the decedent and the plaintiff argued over the indebtedness owing to the plaintiff by the decedent, including the income from the plaintiff's farm, and that the plaintiff was given $9,000 in satisfaction of an indebtedness owed by the decedent to the plaintiff. We believe the following to be applicable.

In Fitch v. Martin, 83 Neb. 124, 119 N. W. 25, affirmed on rehearing, 84 Neb. 745, 122 N. W. 50, the court said: "A plea of general settlement and payment of all claims and demands is not an implied admission that any specific cause of action existed in plaintiff's favor and against defendant during the time covered by that settlement, and is not inconsistent with a general denial."

As we have previously pointed out, the defendants, in their answer, specifically denied that there was a contract between the decedent and the plaintiff.

In Giacomini v. Giacomini, 163 Neb. 798, 81 N. W. 2d 194, this court said: "More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other." See, also, Colbert v. Miller, 149 Neb. 749, 32 N. W. 2d 500; Blodgett v. McMurtry, 39 Neb. 210, 57 N. W. 985.

The plaintiff contends that the acquisition of the property in question by the defendants was obtained by undue influence and mental incapacity.

In an action to set aside an instrument on the ground of undue influence the burden is upon the plaintiff to prove by a preponderance of evidence, which as a whole is of such a substantial nature as to contain some competent and relevant proof of each and all of the following elements: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence

for an improper purpose; and (4) that the result was clearly the effect of such undue influence. Undue influence cannot be inferred from motive or opportunity alone. There must be competent evidence, direct or circumstantial, to show that undue influence not only existed but that it was exercised. Mere suspicion, surmise, conjecture, or speculation is not enough to warrant a finding of undue influence, but there must be a solid foundation of established facts upon which to rest an inference of its existence. See Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568.

In order to set aside an instrument or instruments as contended for by the plaintiff in the instant case for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing. See, Lund v. Woodward, 137 Neb. 689, 291 N. W. 90; Marston v. Drobny, 166 Neb. 747, 90 N. W. 2d 408; Kucaba v. Kucaba, 146 Neb. 116, 18 N. W. 2d 645.

As stated in Sampson v. Sissel, 151 Neb. 521, 38 N. W. 2d 341, an action to set aside an instrument on the ground of undue influence: "This jurisdiction recognizes the right of an owner of property to convey his estate without consideration, or in other words to make a gift of it inter vivos. Newell v. Pierce, 131 Neb. 844, 270 N. W. 469; Smith v. Black, 143 Neb. 244, 9 N. W. 2d 193; Kellner v. Whaley, 148 Neb. 259, 27 N. W. 2d 183."

In First Trust Co. v. Hammond, 140 Neb. 330, 299 N. W. 496, in defining the elements necessary to constitute a gift inter vivos, it was said that there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of

the donee he becomes liable as a trespasser. See, also, Sampson v. Sissel, *supra.*

We fail to find any competent evidence that Tony was unduly influenced by his daughter Helen or the defendants, or that he was mentally incompetent at any time prior to his death. The plaintiff's contention in this respect cannot prevail.

The next question that arises relates to the defendants' affirmative defense that the contract between the decedent and plaintiff, relied upon by the plaintiff, is a forgery.

Winsor C. Moore, an examiner of questioned documents and a professor at law, testified in behalf of the defendants that he examined exhibit No. 1, which is the purported contract between the decedent and the plaintiff. He had examined checks which purported to show the genuine signature of Tony, dated in 1940, 1941, and 1942, for the purpose of making a comparison of those genuine signatures with the signature on the contract. He was unable to arrive at a conclusive opinion as to whether or not the true signature of Tony appeared on the contract. He then took into consideration the question of whether or not the ink appearing on the contract was actually in existence in 1941, and made tests to determine this fact. He observed a glowing fluorescence which indicated that the ink had symptoms of containing what is known as "R.C. 35," an additive put into ink by the Sheaffer Pen Company beginning in February 1955. He concluded, or could only say, that the ink on the instrument had the trace or symptoms of R.C. 35, but his examination was not conclusive, as he was not an ink chemist.

Robert S. Casey, who was a specialist and a qualified expert on inks, examined exhibit No. 1, the contract. He explained that R.C. 35 is a substance, or one of a number of substances, that have the property of adhering to the fibers of paper very strongly, being resistant to hypochlorite bleaches and of fluorescing,

giving off a light, when exposed to filtered ultraviolet light. The first production batches of R.C. 35 put into stock and shipped out were made in February 1955. He testified that he knew of no other ink company that had ever used any substance which reacted similar to R.C. 35 in their inks. This witness made demonstrations and tests before the court to disclose what he meant by R.C. 35 and its relation to the contract here being considered. He gave as his opinion that this contract could not have been written in 1941, because Sheaffer's Skrip did not contain R.C. 35 at that time, and his opinion was that the contract was not written in 1941.

On rebuttal the plaintiff produced a witness who testified that there were several hundred makes of ink, and that fluorescent materials had been available for many years. He was unable to tell what compounds were in the ink on the contract. On cross-examination he testified that he had seen inks that had fluoresced, prior to 1955.

It is apparent that the evidence is in conflict on this issue.

In the case of Renter v. Renter, 148 Neb. 776, 29 N. W. 2d 466, which involved a forgery on a will, this court held: "Testimony of handwriting experts that the signature on an instrument offered for probate as a will is not the signature of the alleged testator, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of subscribing witnesses that they saw the will signed." See, also, In re Estate of O'Connor, 105 Neb. 88, 179 N. W. 401, 12 A. L. R. 199.

When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances. All of the evidential facts which throw light on the issue must be considered as to whether or not the instrument is genuine. If the truth is found in oral testimony, it must determine the issue, but it is

equally potent if found in circumstances. See, Bank of Commerce v. McCarty, 119 Neb. 795, 231 N. W. 34; Wert v. Equitable Life Assurance Society, 135 Neb. 654, 283 N. W. 506; Renter v. Renter, *supra;* In re Estate of O'Connor, *supra.*

As stated in Bank of Commerce v. McCarty, *supra:* "The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons. * * * The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action."

We conclude that there was sufficient evidence on the issue of forgery to permit the trial court to pass upon this issue.

This case is for trial de novo in this court. However, we recognize the rule that the trial court heard and saw the witnesses as they testified. It had a better opportunity to appraise the credibility of the witnesses than does this court. The trial court resolved the conflicting evidence in favor of the defendants. While this court tries appeals in equity de novo, we must necessarily consider the findings of the trial court on matters that are in irreconcilable conflict. Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699; Marston v. Drobny, *supra.*

In the instant case, from the evidence heretofore set out, it is apparent that Tony intended to transfer the proceeds of certain of the bonds to the defendants as a gift. A delivery was made in the form as heretofore mentioned, and the defendants accepted the gift as Tony intended they should. He possessed mental capacity to make such a gift, and he was not unduly influenced in doing so. We find that the plaintiff failed to prove the alleged contract because the evidence shows it was a forgery. We also find that Tony and Kenneth had a complete settlement relating to the rent that

might be due Kenneth from his 80 acres of land, and all other matters that required settlement between them.

From an examination of the evidence and the authorities set forth herein, we conclude that the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

CLARENCE J. SMITH, APPELLANT, V. GAME, FORESTATION AND PARKS COMMISSION OF THE STATE OF NEBRASKA ET AL., APPELLEES.

103 N. W. 2d 829

Filed June 14, 1960. No. 34759.

1. Contracts. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles.
2. ———. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification.
3. ———. In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument.

APPEAL from the district court for Sheridan County: EARL L. MEYER, JUDGE. *Affirmed.*

Crites & Shaffer and *Stubbs & Metz*, for appellant.

Clarence S. Beck, Attorney General, and *Homer G. Hamilton*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

Clarence J. Smith brought this action in the district

court for Sheridan County against the Game, Forestation and Parks Commission of the State of Nebraska and two of its employees. We shall hereinafter refer to the Game, Forestation and Parks Commission of the State of Nebraska as the commission. All of the lands involved in this litigation lie in Township 28 North, Range 44 West of the 6th P.M., in Sheridan County, so for convenience we will herein refer to such lands by section numbers only unless we refer to the township as a whole when we will refer to it as Township 28.

Smith alleged he is the owner of 160 acres of hay land located on the south half of the southwest quarter of Section 22 and the north half of the northwest quarter of Section 27; that in the years 1947 and 1948, the commission, in the name of the State of Nebraska, had acquired title to lands in Sections 15, 16, and 22; that in 1949 the commission caused two structures, one a dam and the other a spillway, to be constructed in the northwest quarter of the northeast quarter of Section 16, which dam and spillway obstruct the natural flow of water from Molly Bourne Swamp into Pine Creek; that the dam and spillway caused the water flowing in this natural drainage basin to back up and form a lake, which backing up caused the water level under his hay land to rise to the extent that the land became marshy and swampy; that the raising of the water level killed the desirable tame or domestic grasses growing in his hay meadow and caused rushes, water grasses, and swamp grasses to grow therein, which are of little value for hay; and that the flooding of his hay meadow makes the harvesting of his hay crop more difficult and expensive. He then states he has no adequate remedy at law and asks that the court enjoin the commission from interfering with the natural flow of water from his hay meadow through drainage ditches and laterals thereto, provided for that purpose, and to require the commission to remove sufficient of the obstructions it has placed therein which are causing the conditions of which

he complains. That is, he wants the lake sufficiently lowered so the drainage from his hay land can flow into it, as it formerly did, without being backed up in the laterals and drainage ditch provided for that purpose.

Two hearings were had, the first on February 28, 1956, and the second on February 19, 1958. On the occasion of both hearings the trial judge viewed the premises. On September 8, 1958, the court rendered a decision in favor of the defendants; dissolved a restraining order, which had been granted plaintiff; and dismissed the action at plaintiff's costs. Plaintiff thereupon filed a motion for new trial and this appeal was taken from the overruling thereof.

The evidence shows there has always been a drainage basin, draining from south to north, through certain lands located in Township 28. As this drainage area passed north through Sections 27, 22, 15, and 16, it was not very wide and formed a low, swampy area with no natural stream flowing through it. Ultimately this drainage formed a lake in the northeast quarter of Section 16. This lake, which was some 20 to 25 acres in area, was known as "Molly Bourne Lake." The drainage out of this lake, which was to the north, was apparently the beginning of Pine Creek.

About 1916 a drainage ditch was built through this drainage basin in Township 28 for a considerable distance south from Molly Bourne Lake. Laterals to the main drainage ditch were then constructed across the swampy areas of the basin and it became good hay land. This drainage ditch is east of appellant's hay land but adjacent thereto. The drainage of appellant's hay land is from south to north and from west to east. There is a fall of from 2 to 3 feet in both directions. There are two east-west laterals across this hay land which empty into the north-south drainage ditch.

Appellant, who is a rancher, acquired about a 1,600-acre ranch in 1938 of which this hay land is a part. The balance of the ranch, consisting of range land, lies to the

south and east of Section 16 but is contiguous to the hay land. About 140 of the 160 acres of the land described as being in Sections 22 and 27 are hay land.

Sometime prior to July 30, 1947, the commission, in the name of the State of Nebraska, acquired title to certain lands in Sections 15, 16, and 22, either by gift or otherwise. Part thereof was given to the commission by James M. Smith, appellant's uncle. The commission decided to create a lake on these lands in order to establish public recreation grounds for hunting and fishing. Sometime prior to July 30, 1947, the commission sent one of its employees, Leon J. Cunningham, to see appellant for the purpose of obtaining from him a release of all damages that might be caused to his lands by reason of the commission creating a lake for fishing on its lands. As a result of Cunningham's visit the appellant did, on July 30, 1947, voluntarily sign the following agreement:

"THIS AGREEMENT, made and entered into this 30th day of July, 1947, by and between Clarence J. Smith and the Game, Forestation and Parks Commission of the State of Nebraska,

"WHEREAS, the said Game, Forestation and Parks Commission proposes to improve and stabilize a certain lake located in Sections 16 and 22, Township 28 North, Range 44 West, 6th P. M., Sheridan county, Nebraska.

"NOW, in consideration of the advantages which said improvements will be to said grantor and to his property, Clarence J. Smith hereby releases the State of Nebraska from all damages which may in any way be sustained by reason of said improvement and hereby grants to the State and public privileges of ingress and egress in order that it may have access to the adjacent shore of the lake.

"It is understood and agreed that suitable fences shall be built and maintained by the State."

In 1949, the commission, with full knowledge of the appellant who took no action to prevent it, caused a dam and spillway to be built in the northeast part of

Section 16 just to the north of the area known as Molly Bourne Lake and in the two drainage outlets therefrom. These structures caused a lake to form, mostly to the south and east thereof, which covers an area of between 200 and 240 acres. It was named "Smith Lake," apparently to honor the man who had given part of the land to the state upon which it is located. The height of the water in the lake is regulated by a control tower located in the lake in front of the dam and is normally kept at a depth of from 9 to 10 feet over at least one-fourth of the lake's area. This is necessary in order to keep the fish, with which the lake has been stocked, from being winter killed. It has been kept at a minimum depth for this purpose. In addition to having the lake stocked with game fish the commission has planted between ten and fifteen thousand trees of various kinds in the area of the lake; it has caused a hard surfaced road to be built from the highway to the lake; has built fences; and has done other things to make the area a recreational place to which the public may come free of charge and where they can fish and hunt. To do this the commission has spent between $27,000 and $35,000.

The dam is about 2 miles north of appellant's hay land. The lake created by the dam extends down into Section 22, but does not extend onto the hay land of appellant located therein, the extreme south end of the lake being some 400 feet north of the hay land. It does, however, cause the water in the drainage ditch to the east of appellant's hay land, and in the laterals across it, to back up and drain less freely. As a result the water table under appellant's hay land has been caused to rise considerably, which has resulted in damage to some 60 acres thereof. This damage consists primarily of killing the tame or domestic grasses growing thereon, which are desirable for hay, and causing swamp grasses to grow in their place, which grasses have little, if any, value as hay. In addition, the wet condition of the

soil, caused by the backing up of the water, at times causes it to be difficult and more expensive to harvest the hay that is growing thereon and, at times, makes it impossible to do so. No claim is made by appellant in this action for these damages.

We come then to the meaning of the agreement the parties entered into for thereby appellant agreed to release the state from all damages which he might sustain by reason of the commission improving and stabilizing a certain lake located in Section 16.

In O-N-L Mills, Inc. v. Union Pacific R. R. Co., 151 Neb. 692, 39 N. W. 2d 501, we said: "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." And in Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N. W. 2d 474, we said: "In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification."

"In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument." O. C. Hirsch Constr. Co. v. Peterson, 167 Neb. 295, 92 N. W. 2d 694.

Both parties offered parol evidence of what the preliminary negotiations between the parties had been which lead up to the execution of the agreement in order to show the meaning of the language used. The evidence in this respect is in irreconcilable conflict. In view thereof the following has application: "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an

irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." Johnson v. Erickson, 110 Neb. 511, 194 N. W. 670. See, also, Worm v. Crowell, 165 Neb. 713, 87 N. W. 2d 384.

In this respect the evidence shows that sometime prior to July 30, 1947, probably in June, Leon J. Cunningham, then an employee of the commission, went out to appellant's ranch home; that he found appellant at home and there discussed with him the commission's desire to improve the land it owned north of his land, a part of which appellant's uncle had given the commission in the name of the State; that he told appellant the commission was going to create a lake thereon so the public could use it for fishing and recreational purposes; that the commission would construct a dam for that purpose in order to raise the level of the water to as great a height as possible so the depth of the lake would be sufficient for stocking fish; and that he told appellant the water might back up enough to get onto one or two low spots located northwest of his house. It thus becomes clear that appellant knew what the commission meant by the words of the agreement to the effect that it would "improve and stabilize a certain lake." Under this situation we do not think appellant is now in a position to complain of what the commission did, which is exactly what Cunningham told appellant the commission intended to do in order to improve the lake thereon to make it available to the public for fishing and recreation. The improvements made are such that the commission can stabilize it for that purpose. To grant appellant the relief he asks would, for all practical purposes, destroy what the commission has done. Under the circumstances here disclosed we do not think a court of equity should do so.

We affirm the judgment of the lower court. All costs of this appeal are taxed to appellant.

AFFIRMED.

HAROLD C. LUDWIG ET AL., APPELLEES, V. BOARD OF COUNTY COMMISSIONERS OF SARPY COUNTY, NEBRASKA, ET AL., APPELLANTS.

103 N. W. 2d 838

Filed June 24, 1960. No. 34746.

1. **Officers.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties as required by law.
2. **Counties.** The courts will not ordinarily exercise their jurisdiction to set aside the redistricting of a county where it appears that the county board by an exercise of sound discretion has effected that reasonable approximation to equality which is required by the statutory command that the districts shall contain as nearly as may be possible an equal division of the population.
3. **Courts.** A judicial question arises whenever an act of reapportionment is clearly and palpably tainted with an abuse of discretion.
4. **Evidence.** Courts of this state will take judicial notice of a United States census and its results, and a school census and its results; also of an authorized election and its results, and the number of votes cast thereat.
5. ———. Courts of this state will take judicial notice of the population of a county created by it and of the counties therein in which a statute of the state is effective, if its operation depends upon the existence of a specified population.
6. **Statutes.** The court, in considering the meaning of a statute, should if possible discover the legislative intent from the language of the act and give it effect.
7. ———. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.
8. ———. In considering the meaning and effect of such a statute, the legislative intent must be discovered if possible from the language used considered in its plain, ordinary, and popular sense.
9. ———. The Legislature is presumed to know the general conditions surrounding the subject matter of legislative enactment, and it will be presumed it knows and contemplates the legal effect that accompanies the language it employs to make effective the legislative will.
10. ———. The terms "inhabitant" and "population" may have different meanings depending upon the context in which they are

used and the intent of the legislative act in which they appear, but they may be used interchangeably or synonymously in a plain, ordinary, and popular sense.

11. **Counties.** As used in section 23-151, R. R. S. 1943, "population" means the whole number of people or inhabitants, regardless of age, sex, business, or occupation, whether civilian or military in character, who live in a county or in a county commissioner district at the time of its creation by redistricting the county.

12. **Officers: Costs.** When a public official has been guilty of misfeasance, nonfeasance, or negligence in fulfilling the duties of office imposed on him by law, he is liable for the costs of an action or proceeding brought to remedy the wrong to the same extent that any other individual wrongdoer would be liable for costs.

APPEAL from the district court for Sarpy County: JOHN M. DIERKS, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Dixon G. Adams and *Tesar & Tesar,* for appellants.

LeRoy W. Weber and *Smith & Smith,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Appellees, herein called plaintiffs, were allegedly residents, electors, and taxpayers in Sarpy County. They filed a petition for themselves and others similarly situated in the district court for said county against appellants, herein generally called defendants or designated by name. Plaintiffs' petition contained two causes of action. The first cause of action sought a declaratory judgment, and the second sought injunctive relief. The first, as far as important here, alleged in substance that the county was not under township organization, and contained more than 20,000 and less than 200,000 inhabitants when on November 4, 1958, the proposition of increasing Sarpy County commissioner districts from three to five was submitted to the electors of the county and carried, under the provisions of section 23-148, R. S. Supp., 1959, effective September 20, 1957, and section

23-149, R. R. S. 1943, and that thereafter, on December 29, 1958, the then county commissioners, Schram, Kostal, and Krist, who was thereafter succeeded in office by defendant Ely, purported to redistrict the county into five commissioner districts, as commanded by section 23-151, R. R. S. 1943. Plaintiffs alleged that in doing so, said defendants, then serving as county commissioners, failed and refused to comply with the mandatory provisions of said statute, which provides that each of the five districts shall consist of two or more voting precincts comprising compact and contiguous territory and embracing, as nearly as may be possible, an equal division of the *population* of the county.

Plaintiffs prayed that the purported redistricting by said defendants should be declared illegal, null, void, and of no effect; that the word "population" appearing in section 23-151, R. R. S. 1943, be held to include all persons who lived in the county on December 29, 1958; and that defendants be directed and required to lawfully comply with said statute.

Plaintiffs' second cause of action reiterated in substance the material allegations of their first cause of action; alleged that plaintiffs had no adequate remedy at law; and prayed for injunctive relief.

Defendants' answer, as far as important here, admitted that plaintiffs were residents, electors, and taxpayers of the county; that defendants Schram, Kostal, and Ely, who succeeded defendant Krist in office, are now the duly elected, qualified, and acting county commissioners; that at all times alleged the county was not under township organization and contained more than 20,000 and less than 200,000 inhabitants; and that on November 4, 1958, the proposition of increasing the commissioner districts from three to five was duly submitted to the electors of the county and carried. Defendants then denied generally and alleged that the county was redistricted as provided by law in an attempt to give the voters an equal voice in government; that in making re-

districting, equality of representation is not required to be mathematically exact; that defendants had a reasonable discretion which they exercised in good faith without ulterior motives or political consideration; that a disparity in the population of commissioner districts was unavoidable; and that the word "population" in the statute as applicable to Sarpy County means citizen population and not the personnel quartered at Offutt Air Force Base, hereinafter called Base, who are not legal residents of the county. Defendants prayed for dismissal of plaintiffs' petition and recovery of costs. Plaintiffs' reply was a general denial.

After a trial to the court whereat evidence was adduced, a judgment was rendered which found and adjudged the issues generally in favor of plaintiffs and against defendants; that the word "population" as used in section 23-151, R. R. S. 1943, and applicable to Sarpy County, means and should include all persons living in the county regardless of their business, occupation, civilian or military service, except only those persons living on the Base; that such statute requires, in the formation of districts, that they each embrace, as nearly as may be possible, an equal division of such defined population; that action of defendant county commissioners serving on December 29, 1958, in redistricting the county, including their official resolution and map then adopted and filed as parts of such action, although done in good faith, did not comply with said statute although it was possible to do so; and that each and all defendants' redistricting actions were invalid, null, void, and of no effect. Defendants were then enjoined from carrying out or attempting to carry out redistricting of the county as fixed and established on December 29, 1958, and defendant county commissioners thereafter serving as such were ordered to proceed forthwith to fix and establish five commissioner districts in conformity with section 23-151, R. R. S. 1943, and the court's judgment. Costs were taxed to Sarpy County.

Thereafter, defendants' motions for new trial were overruled and they appealed, assigning that: (1) The findings and judgment were not sustained by the evidence but were contrary thereto and contrary to law; and (2) in such respect the court erred in concluding that "population" as used in section 23-151, R. R. S. 1943, meant all persons living in the county, including Base and civilian military personnel, and their dependants who resided off the Base, and in concluding that in redistricting they should be counted in determining an equal division of the population of the county. We do not sustain defendants' assignments.

On the other hand, plaintiffs cross-appealed, assigning: (1) That the trial court erred in concluding that all persons living on the Base should not be counted in determining an equal division of population of the county; and (2) that the trial court erred in finding that the defendant county commissioners who voted for redistricting of the county on December 29, 1958, acted in good faith and in taxing costs to the county. We sustain plaintiffs' assignments.

As applicable here, section 23-151, R. R. S. 1943, provides in part: "Each county, not under township organization, having not more than two hundred thousand inhabitants, shall be divided into three districts numbered respectively, one, two and three, or into five districts as provided for in sections 23-148 to 23-150, which shall be numbered respectively, one, two, three, four and five; * * * and shall consist of two or more voting precincts, comprising compact and contiguous territory and embracing, as nearly as may be possible, an equal division of the population of the county and not subject to alteration oftener than once in four years. One commissioner shall be nominated and elected by each of said districts, but shall be elected by the qualified electors of the entire county in counties having a population in excess of one hundred thousand. * * * Provided, * * * in counties where a majority have voted for five commissioners, it

shall be the duty of the county board of such county, at their first meeting after the publication of the state or *federal census,* or after an election deciding to have five, to divide said county into five commissioner districts, as provided for by law; and provided further, the three commissioners of such county whose terms of office will expire after said election shall continue to represent the districts in which they reside after the redistricting of such county, until the expiration of the terms for which they were elected and until their successors are elected and qualified. At the general election next after the division of a county into five districts, one commissioner shall be elected for each of the two remaining districts." (Italics supplied.) For appointment of the two commissioners for the two commissioner district vacancies pending the next general election, see section 32-1040, R. R. S. 1943.

Concededly, this action is triable de novo as in equity upon an appeal to this court under rules heretofore too well established to repeat. The primary question presented is the meaning of "population" as used in section 23-151, R. R. S. 1943. In that connection, defendants contend that all those persons who were not legal residents or voters, whether military or civilian, and their dependents as well, and whether they lived either off or on the Base, should be excluded in determining the population of the county. In other words, defendants say in effect that since the act refers to such "qualified electors" in connection with election of commissioners, and "where a majority have voted for five commissioners," the word "population" was meant and intended to include only legal residents or voters living in the county and in each district, in which event the redistricting could be sustained. Defendants admitted, however, that if "population" included all persons, whether legal residents or not, living in the county, on December 29, 1958, then the redistricting would not be in conformity with law. On the other hand, plaintiffs argued that "popu-

lation" means the whole number of people living in the county on December 29, 1958, or when the redistricting is finally accomplished, and we agree.

Defendants' brief makes no contention that the county commissioners did not have a mandatory duty to comply with the provisions of section 23-151, R. R. S. 1943, or that plaintiffs had no right or authority to bring this action. Defendants, relying upon Niklaus v. Miller, 159 Neb. 301, 66 N. W. 2d 824, argued, as held therein, that: "It is presumed that a public administrative body acts in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest." However, such presumption is rebuttable, and we conclude that it has been rebutted here. As held in Campbell Co. v. City of Harvard, 123 Neb. 539, 243 N. W. 653: "In absence of evidence showing misconduct or disregard of law, regularity of official acts is presumed." Also, as held in City of Scottsbluff v. Southern Surety Co., 124 Neb. 260, 246 N. W. 346: "In absence of evidence to the contrary, it may be presumed that public officers faithfully performed official duties."

Defendants' brief does not argue that the Base is not any part of Sarpy County, and there is no competent evidence that it is not. Rather, the official redistricting map of the county, attached to and made a part of the official resolution of the county commissioners redistricting the county, not only makes such Base a part of the county but also makes it a part of commissioner district No. 2, which is primarily involved in this case. Also, all other official maps of the county offered and received in evidence show that such Base is a part of the county. Further, section 22-177, R. S. Supp., 1959, effective September 18, 1955, which defines and fixes the boundaries of Sarpy County, does not exclude such Base as a part of the county, and we have not been cited or found any statute that does so, or authority for any conclusion that the Base is not a part of Sarpy County.

It will be noted that, contrary to defendants' contention, in counties such as Sarpy, which concededly has a population of less than 100,000, section 23-151, R. R. S. 1943, provides that: "One commissioner shall be nominated and elected by each of said districts," and "At the general election next after the division of a county into five districts, one commissioner shall be elected for each of the two remaining districts." Thus, the mere fact that one district may contain more legal residents or voters than another is not decisive because the five county commissioners, although "nominated and elected by each of said districts" do not represent only the electors of the county. They, as a board, represent and transact the county's governmental, administrative, and quasi-judicial affairs for and on behalf of the entire population of the county, that is, all of the people living in the county. Section 23-151, R. R. S. 1943, requires the county commissioners: "* * * at their first meeting after the publication of the state or federal census, or after an election deciding to have five, to divide said county into five commissioner districts, as provided for by law; * * *." Thus, a consideration of the federal census becomes important in this case.

In Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602, we held that: "The courts of a state may take judicial notice of the population of a county created by it and of the counties therein in which a statute of the state is effective if its operation depends upon the existence of a specified population.

"The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect.

"If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature." In that opinion, referring to certain sections unimportant here, and citing numerous authorities, we said: "The

provisions of the statute are applicable to counties having thirty-six hundred inhabitants or more. The record is silent as to the population of Kearney County, but the courts of a state may take judicial notice of the population of a county created by it and of the counties wherein a statute of the state is operative, if its operation depends upon the existence of a specified population. * * * This court may, and does, take judicial notice of the fact that population of Kearney County is more than six thousand. * * * In considering the meaning and effect of these, the legislative intent must be discovered if possible from the language used considered in its plain, ordinary, and popular sense."

Also, with regard to the first holding above set forth, it is the general rule that it is proper as an aid for the court to present evidence with regard to which the court takes judicial notice. See, Buffalo County v. Bowker, 111 Neb. 762, 197 N. W. 620; State ex rel. Blessing v. Davis, 66 Neb. 333, 92 N. W. 740; Kokes v. State ex rel. Koupal, 55 Neb. 691, 76 N. W. 467. In the last-cited case, this court also held: "Courts will take judicial notice of a United States census and its results, a school census and its results; also of an authorized election and its results, and the number of votes cast thereat."

In 14 C. J. S., Census, § 1, p. 101, citing authorities, it is said: "'Census,' in its ordinary meaning refers to an official enumeration of the population of a country or district; an official enumeration of the population of a country or of a city or other administrative district. In general, a census must be an official enumeration of the people, and, as such, a public record, containing not merely a sum total, but an official list, of the names of all the inhabitants preserved in the public archives and, except in so far as the statute under which it is taken prescribes otherwise, subject to public inspection."

In City of Twin Falls v. Koehler, 63 Idaho 562, 123 P. 2d 715, the court said, in speaking of the federal census:

"In other words, as above pointed out, the census is taken for the purpose of ascertaining, as a matter of fact, how many people were in a given municipality or state on the first day of April, 1940."

In City of Compton v. Adams, 33 Cal. 2d 596, 203 P. 2d 745, the court said: "A census has been defined as 'an official enumeration of the population of a country or of a city or other administrative district, generally with classified information relating to social and economic conditions.' (Webster's New Int. Dict. (2d ed.), 1941; see In re Cleveland's Claim, 72 Okla. 279 [180 P. 852, 855].)"

Also, in Excise Board, Washita County v. Lowden, 189 Okl. 286, 116 P. 2d 700, the court held: "A census bulletin officially issued, though a preliminary report, is a guide for official action in determining population."

The federal census includes all persons living in the county, including military and civilian employees quartered on or living off military installations, together with members of their families. In that connection, the 1950 Census of Population, vol. I, Number of Inhabitants, p. ix, published by the Bureau of the Census in 1952, and the 1950 Census of Population, vol. II, Characteristics of the Population, p. 2, published by the Bureau of the Census in 1953, both point out that: "In accordance with Census practice dating back to 1790, each person enumerated in the 1950 Census was counted as an inhabitant of his usual place of residence or usual place of abode, that is, the place where he lives and sleeps most of the time. This place is not necessarily the same as his legal residence, voting residence, or domicile, although, in the vast majority of cases, the use of these different bases of classification would produce identical results. * * * Persons in the armed forces quartered on military installations were enumerated as residents of the States, counties, and minor civil divisions in which their installations were located. Members of their families were enumerated where they actually resided. In the 1950

Census, college students living away from home were considered residents of the communities in which they were residing while attending college, rather than as persons temporarily absent from their parental homes as was the practice in 1940. * * * Inmates of institutions, who ordinarily live there for long periods of time, were counted as inhabitants of the place in which the institution was located; whereas patients in general hospitals, who ordinarily stay for a short time, were counted at, or allocated to, their homes."

In City of Bisbee v. Williams, 83 Ariz. 141, 317 P. 2d 567, the activation of a military installation resulted in an increase in the population of the city and such personnel were counted as part of such population. In the opinion it is said: "The word 'census' comes from the Latin verb 'censo', meaning 'to count or to reckon'. Most if not all of the states have statutes classifying cities and towns on the basis of population; providing quotas for the issuance of licenses; creation of judicial districts, and the like, based on population. Population is usually determined as the result of a census and it is true in the United States when one speaks of 'the census' the term has come to be understood as meaning the United States decennial census.

"Historically, in the Roman language census meant 'a numbering of the people'. Webster says that census is 'an official enumeration of the population of a country, or of a city or other administrative district.' "

The words "inhabitants" and "population" may have different meanings, depending upon the context in which they are used, and the intent of the act in which they appear, but they may be used interchangeably or synonymously, in a plain, ordinary, and popular sense. They are so used in the federal statutes requiring the taking of a federal census, and in the mandatory provisions of section 23-151, R. R. S. 1943. As generally used, "population" means the whole number of people or inhabitants living in a state, county, section, or area,

or the body of the inhabitants who live in a given locality. See Bethel Township Veterans Home Assn. Liquor License Case, 180 Pa. Super. 159, 119 A. 2d 613.

In State ex rel. Fairchild v. McCarthy, 257 Wis. 62, 42 N. W. 2d 484, speaking of inhabitants and population, it is said: "These definitions are not conflicting or inconsistent. When there is more than one resident 'inhabitant' in a municipality they constitute the 'population;' and the definition of this word is, 'The whole number of people or inhabitants in a country, section, or area.' Webster's New International Dictionary (1948 ed.)."

In State ex rel. Blessing v. Davis, *supra*, this court said: "The population of the county, as shown by the United States census returns, was in 1890, 7,092 and in 1900, 7,390. The votes cast at the general election in 1890 were 1,515, and in 1900, 1,793. The school census for the year 1899 was 2,863 and for the year 1900, 2,834. With data of the character just mentioned, the question is, what is the proper inference to be drawn as to the total population on November 7, 1899? Was it 8,000 or more, or less than that number? While the United States census reports are not conclusive as to the true population in any given territory, they afford very satisfactory evidence of the fact in dispute, and unless overcome by competent evidence of some other character, should, we are satisfied, be accepted as prima-facie evidence of the total population of the territory under consideration."

It seems to us that such cases point out the fact that population and legal residents or voting population are different classifications. Apropos of such distinction, in section 23-267, R. R. S. 1943, relating to supervisor districts as distinguished from commissioner districts, the number of inhabitants in a county is determined by multiplying the total number of votes cast therein at the last general election by five, which indicates that the

Legislature did not confine inhabitants or population to legal residents or voters.

In Cram v. Chicago, B. & Q. Ry. Co., 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. N. S. 1022, this court held that: "The legislature is presumed to know the general conditions surrounding the subject matter of legislative enactment, and it will be presumed it knows and contemplates the legal effect that accompanies the language it employs to make effective the legislative will."

The parent of section 23-151, R. R. S. 1943, is Laws of Nebraska, 1879, § 54, p. 369, which provides for three commissioner districts, each "embracing as near as may be possible one-third of the population of the county, * * *." If the Legislature, after having provided in different previous sections thereof for political action by "a majority of the legal voters," or "a majority of all the votes," or "the qualified voters," or "the qualified electors," or "two-thirds of the votes cast," had intended the county to be divided according to legal residents or voters, instead of population, it would have said so then or since, but it has continuously failed to do so for more than 80 years.

In other words, in the exercise of political power, nonresident voters are not entitled to participate or be considered or included, but the rights of all people as a part of the population of the county are entitled to be included in respect of administrative, quasi-judicial, or judicial functions which may come to have jurisdiction over the person and property of all persons living in the county. Cases relied upon by defendants involve political power or are based upon different statutory or constitutional provisions, and are distinguishable here.

It is generally the rule that: "The court will be slow to exercise its jurisdiction to set aside the redistricting of a county where it appears that the board by any exercise of sound discretion has effected that reasonable approximation to equality which is required by the statutory command that the districts shall con-

tain as nearly as practicable equal populations. A judicial question arises, however, whenever an act of reapportionment is clearly and palpably tainted with an abuse of discretion." State ex rel. South St. Paul v. Hetherington, 240 Minn. 298, 61 N. W. 2d 737. See, also, 20 C. J. S., Counties, § 40b, p. 794, and authorities cited therein.

As hereinafter observed, if military personnel and civilian employees of the Base who live both off and on the Base were excluded, as defendants would have us do, there would be a great disparity of population and unequal representation, because every person living in the county is entitled equally with all others to representation. The same would be true if only such military personnel and civilians who live off the Base were included, as ordered by the trial court. Either event would arbitrarily and unlawfully divide the county into districts without any proper regard to population of the county and districts. In that connection, it would be entirely illogical to include all those people who live off the Base and exclude the same classification of people who live on the Base.

The material facts are not generally in dispute. It is admitted that at all times involved here the county of Sarpy, having three county commissioners and not under township organization, had a population of more than 20,000 and less than 200,000 on November 4, 1958, when the proposition of increasing the county commissioner districts in the county from three to five was submitted to the electors and carried. Thereafter, upon notice given, a hearing was held on December 15, 1958, by the then three county commissioners for the purpose of redistricting the county into five commissioner districts as required by section 23-151, R. R. S. 1943. Thereat, numerous interested persons appeared, who, in representing themselves and improvement and taxpayers associations, presented five different plans, supported by

official maps of the county for making such redistricting.

On December 29, 1958, the county commissioners, who theretofore had the advice of counsel, adopted and filed a resolution and map purportedly prepared by the county attorney. Such map of the county simply designated the boundaries of each of the five districts as outlined and enumerated by a green pencil or chalk, without designating thereon or setting forth in the resolution the population of the county or any such district. The resolution itself simply described the boundaries of each district. One such commissioner testified that he did not recall who gave the county attorney the information put in the resolution or upon the map, and that no commissioner gave him any information as a directive. The county commissioners testified in substance that in connection with redistricting they acted in good faith without ulterior motives or political consideration. However, they admitted that they did not take any official action determining or fixing the population of the county or of the several districts on December 29, 1958, but that they simply adopted plan No. 2 presented to them on December 15, 1958, after slightly altering the boundaries of one district. Such plan excluded all military and civilian Base personnel living in the county. The commissioners testified that before redistricting, the board considered the advice of counsel; the advice theretofore given by an expert statistician hereafter mentioned; the five plans presented to them on December 15, 1958; the 1950 federal census; the 1958 school census; their personal knowledge; the official votes cast at the last general election; the ever-expanding industrial and housing construction in the county; the population growth of Papillion, Bellevue, and other parts of the county, some of which had become almost a suburb of Omaha; and their resolution of December 12, 1955, which determined the county's population to be 20,500 for the purpose of fixing salaries for county officials. The board did not

include or consider any military or civilian employees of the Base living on or off the Base in making the district apportionments. However, the boundaries of district No. 2, primarily involved here, did include both the city of Bellevue and the Base, together with some other adjacent territory.

In that connection, the record discloses that if the military personnel living on the Base were included, then district No. 1 had a population of 3,296, or 13.72 percent; *district No. 2 had a population of 12,226, or 50.89 percent;* district No. 3 had a population of 3,260, or 13.57 percent; district No. 4 had a population of 2,497, or 10.54 percent; and district No. 5 had a population of 2,744, or 11.28 percent, making a total population of 24,023. By excluding those people living on the Base, district No. 1 had a population of 3,296, or 17.03 percent; *district No. 2 had a population of 7,559, or 39.05 percent;* district No. 3 had a population of 3,260, or 16.85 percent; district No. 4 had a population of 2,497, or 12.90 percent; and district No. 5 had a population of 2,744, or 14.17 percent, making a total of 19,356. In either event, there would be a gross disparity of population in the respective districts.

The record admittedly discloses that on November 4, 1958, 4,769 votes for Governor were cast in the county. Out of that number, in Bellevue alone, which is located in proposed commissioner district No. 2, there were cast 1,229 votes. It will be observed that, counting resident voters alone, as defendants would have us do, there would still be a gross disparity of district population. The official school census of 1958 for the entire county was 19,480, excluding the Base personnel. The 1958 official school census for District No. 1, located in purported commissioner district No. 2, contained a total of 7,471. Also, the evidence discloses that part of school district No. 40, containing a population of 479, was made a part of commissioner district No. 2.

Plans Nos. 1 and 2, presented to the board on De-

cember 15, 1958, were substantially alike, and, as heretofore mentioned, the board adopted proposed plan No. 2. Exclusive of military and civilian employees of the Base living on and off the Base, plan No. 1 proposed commissioner district No. 1 with a population of 3,975; district No. 2 with a population of 6,000; district No. 3 with a population of 2,745; district No. 4 with a population of 2,851; and district No. 5 with a population of 2,724, which made a total county population of only 18,295. Likewise, plan No. 3 proposed commissioner district No. 1 with a population of 4,006; district No. 2 with a population of 3,605; district No. 3 with a population of 3,993; district No. 4 with a population of 3,913; and district No. 5 with a population of 3,950, which made a total county population of only 19,467. Likewise, plan No. 4 proposed commissioner district No. 1 with a population of 3,633; district No. 2 with a population of 3,486; district No. 3 with a population of 3,828; district No. 4 with a population of 4,320; and district No. 5 with a population of 4,200, making a total county population of only 19,467. Likewise, plan No. 5 proposed commissioner district No. 1 with a population of 3,032; district No. 2 with a population of 3,589; district No. 3 with a population of 3,034; district No. 4 with a population of 2,846; and district No. 5 with a population of 2,669, which made a total county population of only 15,170.

The discrepancies in the totals aforesaid are all less than the admitted population of the county, and arise by failure to include those military and civilian employees of the Base who lived in the county. The witness who presented plan No. 4 testified that about 65 percent of the population of the county lived east of U. S. Highway No. 73-75, with more than half of the county revenue coming from Bellevue and the eastern area of the county, with no one on the county board in such areas before redistricting, which was the primary reason for doing so.

An expert in the field of economics since 1950, who specialized in statistics and had, as chairman of the

Department of Business Research at the University of Nebraska for 13 years, made a scientific study of population estimates by employing methods promulgated and used by the Bureau of the Census, testified as a witness for plaintiffs. He took the 1950 population of Sarpy County as shown by the federal census to be 15,693, and changes occurring between 1940 and 1950 and thereafter, and by the use of several long, well-recognized different variables, developed a technique known as correlation for determining the current population of small areas. He had prepared the estimated population of Nebraska counties, as published by the University of Nebraska, in April 1959, which shows Sarpy County with a population of 15,693, in conformity with the 1950 federal census, and estimated that Sarpy County had a population of 22,723 in 1956, and 26,343 in 1958, with the city of Bellevue having a population of 3,858 in 1950, and 8,419 in 1958. The county board had used the advice and conclusions of that same witness when it increased the population of the county to 20,500 in 1955.

Some adult Base military and civilian employees who live off Base own their homes and trailers. Some such personnel pay taxes in the county and some actually are legal residents and voters in the county. Personnel living off and on Base own transportation facilities, buy car and driver licenses in the county, use its governmental, administrative, quasi-judicial, and judicial services and facilities, and enhance the economy. Of course, the children of military personnel who live off and on Base attend public schools in the county. See §§ 79-446 and 79-447, R. R. S. 1943, now §§ 79-446 and 79-447, R. S. Supp., 1959, effective September 28, 1959. All Base military and civilian employees living off and on Base, and their dependents as well, regardless of age or sex, are entitled, as a part of the county's population, to use the county's facilities aforesaid and be represented by the county board. True, the number of such personnel fluctuates some from time to time, but the number of

civilian population likewise fluctuates from time to time. In such respect, the 1950 federal census shows that the county then had a population of 15,693, which had increased to 31,263, including 4,884 Base personnel and their dependents, as shown by the preliminary report of the 1960 federal census, of which we take judicial notice.

The evidence discloses that if only the military and civilian Base personnel living off Base were required to be counted, then on December 29, 1958, commissioner district No. 2 would contain more than twice the percentage of population in any other district, which would be a grossly unequal apportionment and not any compliance with section 23-151, R. R. S. 1943. On the other hand, if the military and civilian Base personnel living on Base were also required to be counted, then commissioner district No. 2 would contain about one-half of the county's population, which defendants admit would not be any compliance with said statute.

The trial court was correct in determining that the word "population" used in section 23-151, R. R. S. 1943, embraces and includes all persons living in the county, regardless of their age, sex, business, occupation, or military or civilian service, who live off Base. However, the trial court erred in excluding all such persons living on Offutt Air Force Base. In other words, the trial court properly held that the redistricting of December 29, 1958, was illegal, void, and of no force and effect, and properly enjoined its enforcement. However, the court should have directed the county board to redistrict the county as required by section 23-151, R. R. S. 1943, which it is possible to do, after determining the population, including all persons living off and on Base and all other persons living in the county, in conformity with this opinion, not as of December 29, 1958, but as of the date when the redistricting is finally accomplished. In that connection, the redistricting should now be accomplished after taking into consideration the 1960 fed-

eral census and such other related competent evidence as may be presented to the board.

Plaintiffs by cross-appeal also assigned and argued that the trial court erred in finding that defendant commissioners acted in good faith, and that the trial court erred in taxing costs to the county. We agree. The costs should have been all taxed to defendants Schram, Kostal, and Krist, who were county commissioners on December 29, 1958, and who then failed and refused to comply with the statute, as they were required to do. The county was not a party in this action. We have been cited no authority, and upon diligent search have found none, which could justify taxing costs to the county, which was not a party to the litigation.

In that connection, section 25-1711, R. R. S. 1943, provides: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." It deals solely with parties in the action. Also, section 25-1933, R. R. S. 1943, deals solely with such parties, and provides: "When a judgment, decree or final order is reversed, vacated or modified, the court may render judgment for all costs against the appellee or appellees or some of them, or may direct that each party pay his own costs or apportion the costs among parties or direct that judgment for costs abide the event of a new trial as, in its discretion, the equities of the cause may require."

In 14 Am. Jur., Costs, § 37, p. 24, citing numerous authorities, it is said: "When, however, a public official has been guilty of misfeasance, nonfeasance, or negligence in fulfilling the duties of office imposed on him by law, he is liable for the costs of an action or proceeding brought to remedy the wrong to the same extent that any other individual wrongdoer would be liable for costs." We cannot conclude that defendants were not guilty of misfeasance, nonfeasance, or negligence. Rather, we conclude that they were. To tax

costs herein to plaintiffs would be an abuse of legal discretion and a grave injustice.

We conclude that the judgment of the trial court should be and hereby is affirmed in part and in part reversed, and said cause is hereby remanded with directions to render a judgment in conformity with this opinion. All costs are taxed to the three defendants heretofore named, who were county commissioners on December 29, 1958.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES P. RAPP, APPELLEE, V. DONALD HALE ET AL., APPELLANTS.

103 N. W. 2d 851

Filed June 24, 1960. No. 34770.

1. **Workmen's Compensation.** An action for workmen's compensation may be maintained in this state where accidental injuries are sustained in this state by an employee of a nonresident employer except against railroad companies engaged in interstate commerce.
2. **Workmen's Compensation: Appeal and Error.** On an appeal from the workmen's compensation court the district court is empowered to set aside an award on the grounds that (1) the court acted without or in excess of its powers, (2) the order or award was procured by fraud, (3) the findings of fact by the court are not supported by the record, or (4) the findings of fact by the court do not support the order or award.
3. ———: ———. Where a retrial has been had before the full compensation court the appeal to the district court is limited in scope and is primarily in the nature of an error proceeding.
4. ———: ———. On an appeal from the district court to the Supreme Court in a workmen's compensation case, the case shall be considered de novo except where the findings of fact are conclusively supported by the evidence as disclosed by the record.
5. **Workmen's Compensation.** For workmen's compensation purposes, total disability means disablement of an employee to earn wages in the same kind of work, or work of a similar na-

ture, that he was trained for or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

6. ———. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act.

7. ———. Disability within the meaning of the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily function.

APPEAL from the district court for Cheyenne County: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Baylor, Evnen, Baylor & Urbom, for appellants.

Heaton & Heaton, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Charles P. Rapp, plaintiff and appellee, against Donald Hale and Preston Brimm, doing business as H. B. Construction Company, defendants and appellants, to recover workmen's compensation on account of an injury sustained by plaintiff on December 10, 1957, in the State of Nebraska, while he was an employee of the defendants.

The action was first tried before one of the judges of the workmen's compensation court. It was thereafter tried before the entire court where it was determined that plaintiff had an accident for which he was entitled to be paid for temporary total disability for 88 2/7 weeks or to August 20, 1959, at the rate of $34 a week, and for permanent partial disability of 15 percent for 211 5/7 weeks at the rate of $9.78 a week, against which the defendants were entitled to a credit of $34 a week for 29 weekly payments which had been made. The plaintiff was also awarded $1,066 for reimbursement of expenses.

From this award the plaintiff perfected an appeal to the district court. The district court tried the case on the record made in the workmen's compensation court. The award was reversed, and it was found that the plaintiff was totally and permanently disabled. In consequence of this a judgment was rendered awarding him $34 a week for 300 weeks and $27 a week thereafter for the remainder of his life. By the judgment he was also awarded $1,066 for expenses incurred. From this judgment the defendants have appealed.

The brief of appellants contains numerous assignments of error as grounds for reversal but to all of them specific reference is not required herein.

By one assignment of error the appellants urge that the Nebraska courts have no jurisdiction over the subject matter of the action. The ground of this is that, although the accident and injury came about in Nebraska, the courts of this state have no jurisdiction for the reason that plaintiff was employed in Colorado where the business of defendants was located.

The contention is without merit. Section 48-106, R. S. Supp., 1959, which is a part of the Workmen's Compensation Act as it appears after amendment effective February 28, 1957, as follows, makes this clear: "The provisions of this act shall apply to the State of Nebraska and every governmental agency created by it, and to every employer in this state, including nonresident employers performing work in the State of Nebraska, employing one or more employees, in the regular trade, business, profession, or vocation of such employer, except railroad companies engaged in interstate or foreign commerce."

The meaning of this provision is clear and definite and leaves no doubt that the Legislature intended that in such situations as this action could be maintained in this state. No cases have been cited which present an opposing viewpoint. Also, nothing has been presented the effect of which is to say that this provision was not

in the exercise of a proper legislative prerogative.

Further, in point of fact, the defendants recognized the work of plaintiff in Nebraska as employment contemplated by the Nebraska Workmen's Compensation Act. They had a policy of insurance on which they paid premiums for service in Nebraska on those days when the plaintiff worked in Nebraska, and a separate policy for work in Colorado.

The defendants urge that the district court should not have tried the case de novo but, on the contrary, should have considered it in the nature of an error proceeding.

Appeal from a judgment or award of the Nebraska Workmen's Compensation Court to the district court is provided by section 48-184, R. S. Supp., 1959. That section provides in part the following: "Provided, that a judgment, order, or award of the Nebraska Workmen's Compensation Court shall be set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the order or award was procured by fraud, (3) the findings of fact by the court are not supported by the record, or (4) the findings of fact by the court do not support the order or award."

This court said in Solheim v. Hastings Housing Co., 151 Neb. 264, 37 N. W. 2d 212, in interpretation of this provision: "Where a retrial has been had before the full compensation court the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding."

This court however is required to consider an appeal from a judgment of the district court de novo, or in the words of section 48-185, R. S. Supp., 1959: "Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in actions at law." See, also, Solheim v. Hastings Housing Co., *supra;* Rahfeldt v. Swanson, 155 Neb. 482, 52 N. W. 2d 261.

A declared exception is that the hearing shall be de novo unless the findings of fact are conclusively sup-

ported by the evidence as disclosed by the record. Tucker v. Paxton & Gallagher Co., 153 Neb. 1, 43 N. W. 2d 522; Werner v. Nebraska Power Co., 149 Neb. 408, 31 N. W. 2d 315.

Under this general rule the assignment of error must be said to be without merit as is clear without discussion. Under the exception it must also be said that it is without merit since the findings of fact are not conclusively supported by the evidence. There is clearly a dispute in the evidence relating to material issues.

These cases make clear that the function of this court in this area is the same whether the hearing in the district court was conducted de novo or in the nature of an error proceeding.

The particulars as to lack of conclusiveness of the findings of fact will be made to appear clearly later herein.

The record of evidence on which this case comes to this court and on which it was heard in the district court was made at the hearing en banc before the workmen's compensation court. At that hearing Dr. Chris Bitner was a witness called on behalf of the plaintiff. By an assignment of error the defendants urge that opinion evidence of this witness was erroneously admitted. In the light of the record as it appears in the bill of exceptions the contention contains no merit.

The defendants point out in their brief that this witness testified that he had examined the plaintiff, had taken his history, had examined certain exhibits which were not in evidence, and had examined the testimony of two doctors contained in depositions which were not in evidence, and that on the basis of these things, he had an opinion as to the physical condition of plaintiff. He was asked to give his opinion. Objection was made on the ground that it was improper to give an opinion based in part on the exhibits and the depositions. The objection was sustained. He was then asked if he had such an opinion without basing it on the exhibits and depositions. He answered that he did and was permitted

to answer. The matter of which the defendants complain is therefore without basis in point of fact.

A similar objection is made to testimony of Dr. C. B. Dorwart. Examination of the record discloses that it requires no consideration other than to say that the answer must be the same as that made to the attack upon the testimony of the witness Bitner.

The next matter to be considered, which is the paramount issue in the case, is that of whether or not the plaintiff is entitled to a recovery in excess of the award and judgment of the workmen's compensation court. This involves an evaluation of the injuries sustained in the light of his training and abilities, and the surrounding circumstances. The claim that he sustained some injuries as an employee of the defendants is not questioned.

The record discloses that the plaintiff was born June 18, 1932. His schooling extended through 1 year of high school. He had no training which fitted him for anything except occupations involving as incidents manual labor, heavy lifting, and the exercise of strength. He had worked in a filling station; was in the Marine Corps where he had training in the operation of heavy equipment; had operated a wholesale route for delivery of dairy products, fruit, vegetables, and fish; and he had worked as a patrolman for the Sterling, Colorado, police department. He was 6 feet, 2 inches, tall and had an average weight of 168 pounds. In his employment by the defendants he first did manual labor requiring heavy lifting after which he became a heavy equipment operator. On the date of his injury he was engaged in the operation of a D6 caterpillar tractor which weighed approximately 22,000 pounds. The accident was caused by the tractor falling into a hole. As a result of the accident he received the injuries of which he complains. He was first attended by Dr. Chris Bitner at a hospital in Sidney, Nebraska. He was, on December 13, 1957, taken to Denver, Colorado, where

he was attended by Dr. John T. Jacobs almost daily until June 1958. During that time he was in a hospital at one time for 6 or 8 days, at another about 4 days, at another about 5 days, and at still another about 12 days. He returned from home to Denver to see the doctor in July and August 1958. He was discharged by the doctor in August 1958. He returned for examination by Dr. Jacobs next on May 28, 1959, and for examination by Dr. John E. Gardell on August 18, 1959.

As to his condition the plaintiff testified, to the extent necessary to state here, that since he was injured he has continually suffered pain, has been unable to engage in any kind of full employment in which he had worked or for which he was trained, and was without ability to engage in any kind of heavy manual activity.

Dr. Bitner testified on the basis of his examination and the history he received that in his opinion the plaintiff would never be able to return to the heavy manual labor and that nothing could be done which would permit him to return to the operation of heavy equipment.

Dr. Dorwart testified that in his opinion the plaintiff was totally disabled for operation of heavy equipment such as caterpillars or tractors and for manual labor requiring bending or heavy lifting.

Dr. John E. Gardell testified by deposition, which was taken on August 20, 1959. The trial of this case started before the workmen's compensation court on August 26, 1959. He testified that he examined the plaintiff on May 28, 1959, and on August 18, 1959. He made a thorough examination which he described and took a history. He gave it as his opinion that plaintiff's disability in relation to his occupations was 15 percent of the body as a whole. As to the subject of ability to perform the work in plaintiff's fields of training he said: "Well, I believe there are many parts of all those jobs that he could do at the moment, and later I don't have any doubt in my mind that he could get back to most

of it with the exception of the heavy equipment operation probably." Later a question was asked and an answer returned. The question in part and answer are: "* * * do you believe that this man is capable of doing manual labor that requires heavy back bending? A. Not now but ultimately."

Dr. John T. Jacobs also testified by deposition which was taken on May 28, 1959. The plaintiff was a patient of this doctor while he was under treatment in Denver, Colorado. His testimony was based on examination, observation, treatment, and history. He testified that in his opinion the plaintiff had reached his maximum improvement in August 1958, and that his condition was worse at a later date when he examined him, which was probably May 28, 1959, than in August 1958. He gave it as his opinion that the permanent disability of the plaintiff was 15 percent and might eventually be only 10 percent.

In response to specific questions he did not recommend that plaintiff return to the operation of heavy equipment or any other work that would necessitate heavy back bending. He was asked the following question: "Q In other words, his disability resulting from this injury of December 10, 1957, is such that you do not see in the foreseeable future that he would be able to do heavy manual labor?" He answered: "Well, he might be able to but the probability is against it and at least we say it isn't desirable."

As is made clear the plaintiff claims total permanent disability and the defendants contend that his permanent disability does not exceed 15 percent. Basic in a determination are certain legal principles defining total disability which are stated as follows in Elliott v. Gooch Feed Mill Co., 147 Neb. 309, 23 N. W. 2d 262:

"For workmen's compensation purposes, 'total disability' does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature,

that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

"A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law."

These principles have been consistently adhered to. See, Anderson v. Cowger, 158 Neb. 772, 65 N. W. 2d 51; Haler v. Gering Bean Co., 163 Neb. 748, 81 N. W. 2d 152; Miller v. Peterson, 165 Neb. 344, 85 N. W. 2d 700; Crable v. Great Western Sugar Co., 166 Neb. 795, 90 N. W. 2d 805; Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N. W. 2d 492; Tilghman v. Mills, 169 Neb. 665, 100 N. W. 2d 739.

In Miller v. Peterson, *supra,* the following observations were made: "Disability under section 48-121, R. S. Supp., 1953, subdivisions (1) and (2), is defined by our statute in terms of employability and earning capacity rather than in terms of loss of bodily function.

"In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof." See, also, Pavel v. Hughes Brothers, Inc., *supra.* The statute referred to in these cases is not different in this respect from what is now referred to appropriately as section 48-121, R. S. Supp., 1959.

As pointed out the district court reversed the judgment of the workmen's compensation court, found that plaintiff was totally and permanently disabled, and rendered judgment accordingly.

Was the plaintiff, under the evidence and within the meaning of these stated principles, totally disabled? The answer must be in the affirmative.

The evidence on behalf of the plaintiff that he was totally disabled on account of his injuries from per-

forming the functions in the areas of his training and in the performance of the work for which he was fitted stands without real refutation. It is true that there is competent evidence that he was able to perform incidents of some of the kinds of employment for which he was fitted and in which he had been engaged, but none that he was able to perform other important and necessary incidents of such employment.

It is further true that there is opinion evidence that by exercise and self-training the plaintiff probably could restore his ability to perform the work of the occupations in which he previously worked, but none that he was able so to do without described necessary rehabilitation processes.

In the light of this the conclusion is inevitable that within the meaning of the Workmen's Compensation Act the plaintiff, at the time of the trial and at all times prior thereto back to the date of the accident, was totally and permanently disabled. The district court correctly so found.

As an observation, if in the future he shall become rehabilitated and thus after some point be no longer entitled to the benefits of an award or judgment on this basis, the defendants will not find themselves without a remedy. That remedy is provided by section 48-141, R. R. S. 1943. See, also, Updike Grain Co. v. Swanson, 103 Neb. 872, 174 N. W. 862; Peek v. Ayers Auto Supply, 157 Neb. 363, 59 N. W. 2d 564, 160 Neb. 658, 71 N. W. 2d 204; Chadd v. Western Cas. & Sur. Co., 166 Neb. 483, 89 N. W. 2d 586; Pavel v. Hughes Brothers, Inc., *supra*.

The defendants complain that the court erred in allowing the plaintiff expenses in connection with travel to and from Denver, Colorado, and Sidney, Nebraska, related to his treatment at the hospital in Denver and by the doctor or doctors in attendance. These expenses were for four trips at $35 each; room away from Sidney,

$310; and board expense or meals away from Sidney, $616; or a total of $1,066.

The objection made to the evidence supporting the claim for these expenses was that it was irrelevant and immaterial; that no proper and sufficient foundation had been laid; and that it was not the best evidence. The evidence was based on the plaintiff's own personal knowledge and on his computation, and it was shown sufficiently that it was made necessary in the course of the treatment of the plaintiff on account of his injuries. These were items of expense properly chargeable to the defendants. See, Newberry v. Youngs, 163 Neb. 397, 80 N. W. 2d 165; Pittenger v. Safeway Stores, Inc., 166 Neb. 858, 91 N. W. 2d 31.

The record discloses that the defendants paid to plaintiff on account of temporary total disability $34 a week for 29 weeks. The court made such a finding but obviously by oversight failed by its judgment to give credit for the amount. The defendants are entitled to receive this credit.

In the light of the observations reached herein the conclusion reached is that the judgment of the district court should be and it is affirmed, subject however to a credit thereon for the amount which has been paid for temporary total disability.

The plaintiff is allowed a fee of $600 as compensation for the services of his attorneys.

AFFIRMED.

CONSTANCE JOANNE RIPP, ADMINISTRATRIX OF THE ESTATE OF RICHARD F. RIPP, DECEASED, APPELLEE, V. CHARLES RIESLAND ET AL., APPELLANTS, IMPLEADED WITH ALICE L. RIESLAND, APPELLEE.

104 N. W. 2d 246

Filed July 1, 1960. No. 34671.

1. **Trial.** If there is evidence to sustain a finding for the litigant having the burden of proof in a cause, the trial court may not disregard it and decide the case as a matter of law.
2. **Highways.** All travelers are required to exercise due care in coming to and crossing an intersection of public highways.
3. **Automobiles: Highways.** It is the duty of the driver of an automobile when approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger.
4. ———: ———. The rule that the failure of the driver of an automobile upon approaching an intersection to look for vehicles approaching it, where by looking a collision could be avoided, constitutes negligence more than slight as a matter of law and operates to defeat a recovery is subject to certain limitations. It was not intended to make a person entering an intersection against a favored driver an insurer against a collision irrespective of the negligence of the other party.
5. ———: ———. If two vehicles are approaching an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed.
6. ———: ———. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances and he is not thereby relieved from the duty of exercising ordinary care to avoid accidents.
7. ———: ———. The drivers of vehicles approach an intersection at approximately the same time whenever they are in such relative position that upon appraisal of all the factors it would appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way.
8. ———: ———. If a motorist enters an intersection of two highways and fails to see a motor vehicle not shown to be in a favored position, the presumption is that its driver will respect the right-of-way of the motorist and the question of his contributory negligence in proceeding to cross the intersection is a question for the jury.
9. **Trial: Appeal and Error.** A litigant who requests different

and antagonistic instructions, so that if one is given consistency requires that the other be refused, cannot be heard to complain of the action of the court in erroneously deciding between the two. A litigant may not contest the correctness of any action which he requested or induced.

10. Negligence. A violation of a safety regulation established by statute is not generally negligence as a matter of law but such violation is a fact which may be considered with all other evidence in a case in deciding an issue of negligence.

11. ———. The doctrine of sudden emergency cannot be invoked in a negligence case until there is evidence that a sudden emergency actually existed and that the litigant seeking the benefit of it did not cause it by his acts or omissions or his lack of due care to avoid it.

12. Automobiles: Trial. In the trial of an action concerning a collision of automobiles on an intersection of highways which involves issues of negligence and contributory negligence, the jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of the automobiles in entering and using the intersection.

13. Negligence. Under the comparative negligence act if a defendant has been guilty of gross negligence and a plaintiff has been guilty of slight negligence by comparison with that of the defendant, the plaintiff may recover; if a defendant has been guilty of gross negligence and a plaintiff has been guilty of negligence more than slight by comparison with that of the defendant, the plaintiff may not recover; if the defendant has been guilty of negligence less than gross and the plaintiff has been guilty of negligence in any degree, the plaintiff may not recover.

14. Negligence: Appeal and Error. It is prejudicial error for the trial court to instruct the jury in a case of the character of the present one that before appellants, who were defendants in the trial court, could have the benefit of the defense of contributory negligence of the deceased, they must prove by the weight of the evidence that such negligence was more than slight when compared with the negligence of appellants.

15. Negligence: Trial. If the parties establish and the jury, under proper instructions, finds the respective parties guilty of actionable negligence and contributory negligence, then the responsibility is on the jury to make the comparison contemplated by the comparative negligence act to determine the rights of the parties and the extent thereof. In this respect there is no burden of proof on either litigant but it is the duty of the jury to make the proper comparisons from the evidence before it.

APPEAL from the district court for Hall County: ERNEST G. KROGER, JUDGE. *Reversed and remanded.*

Luebs, Elson & Tracy, for appellants.

John A. Wagoner, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Constance Joanne Ripp as administratrix of the estate of Richard F. Ripp, deceased, seeks to recover by this litigation damages for the wrongful death of her husband, Richard F. Ripp, in the collision of an automobile operated by him and an automobile driven by Charles Riesland on the intersection of two country roads 2 miles south and 1⅓ miles east of Wood River which collision and death were, as it is alleged, caused by the negligence of Charles Riesland.

The appellants are Charles Riesland and Elmer H. Riesland. The former is a son of the latter who was the owner of the automobile operated by his son at the time of the collision and it was at that time used and operated by the son by virtue of circumstances which impute to the father any negligence of his son in the operation of the automobile at that time. Charles Riesland will be referred to herein as appellant, his father will be designated by his name, and the two of them will be designated collectively as appellants. Richard F. Ripp will be identified as deceased. The automobile operated by the deceased was a 1950 Ford coach and the automobile driven by appellant was a 1954 Ford coach. The former will be spoken of as the 1950 Ford and the latter as the 1954 Ford. Alice L. Riesland, the wife of Elmer H. Riesland and the mother of appellant, was a defendant in this case in the district court. A verdict in her favor was directed by that court at the close of the case-in-chief of appellee and the case was dismissed as to her. The correctness of the action of the

trial court in that respect has not been contested. There is no cross-appeal in this court and the judgment of the district court as to her has become and is final.

The collision of the automobiles occurred about 9:30 a. m., December 26, 1957, at substantially the center of the intersection of two country roads which intersect at right angles to each other 2 miles south and 1⅓ miles east of Wood River. It was a clear, pleasant winter day. The roads were dry. The traveled surface of the roads at the place of the accident was graveled. The heirs and next of kin of the deceased are his widow, the appellee, who was 21 years of age at the time of the trial; and Richard Eugene Ripp, the son of appellee and the deceased, who was born June 27, 1958. Appellee was dependent on deceased for her support and maintenance at the time of his death. The deceased was at the time of his death 21 years of age and had, according to the life expectancy tables, a minimum life expectancy of 40.70 and a maximum life expectancy of 45.66. The gross income from his farming and livestock operations in 1957 was $2,754 and the expenses thereof amounted to $997. The net balance was $1,757. Deceased assisted some of his neighbors in their farming operations and was paid wages therefor but the amount or any estimate of it is not shown in the record. Deceased furnished services and support to his wife and she and her son are deprived of the services and support of the deceased by his wrongful death.

The first cause of action of appellee seeks damages because of the alleged wrongful death of deceased and the second cause of action is for the recovery of the amount of the expense occasioned by the injuries to and the death of deceased. The specifications of negligence charged against appellant by appellee included in substance the following: The operation by appellant of his 1954 Ford at an excessive rate of speed in view of the conditions then and there existing; failure of appellant to decrease the speed of his 1954 Ford sufficiently

to enable the 1950 Ford of deceased to pass through the intersection in safety; failure of appellant to have and maintain a proper lookout for traffic approaching and entering the intersection from the right; failure of appellant to apply the brakes of his 1954 Ford and thereby avoid the collision of it with the 1950 Ford of deceased; and failure of appellant to yield the right-of-way to deceased who was entering the intersection from the right.

The substance of the defenses of appellants is a denial of the claims of appellee except her status and capacity to maintain this action and that deceased died December 26, 1957, as a result of injuries he sustained in the collision of automobiles at the time and place alleged by appellee, and a plea of contributory negligence of the deceased of a nature and degree sufficient to defeat recovery in the case by appellee and detailed in numerous specifications which will, as necessity requires, be detailed hereafter in the consideration of errors assigned by appellants. Appellee traversed the new matter in the answer. The result of a trial of the issues was a verdict for appellee on each of her causes of action. The motion for a new trial was denied and judgment was rendered on the verdict. This appeal presents the record for review.

The deceased was operating his 1950 Ford on the east-west road traveling west toward the intersection described above immediately before the collision at approximately the center of the intersection. He was the only occupant of his vehicle. Appellant, unaccompanied, was driving his 1954 Ford on the north-south road north toward the intersection shortly before the collision of his automobile and the automobile of the deceased. The traveled portion of the east-west road east of the intersection was 23 feet and the traveled portion of the north-south road south of the intersection was 22 feet. The area of the intersection of the roads was enlarged because it was bounded by curved lines. There were no

stop signs or traffic control devices of any kind at the intersection. The roads were level there and for some considerable distance either direction from it.

There was an eyewitness of the circumstances of the tragedy, the basis of this litigation. She viewed it from the clothesline north of her home which is south and west a short distance from the south-west part of the intersection where the collision occurred. She was produced and examined by appellee. The substance of her testimony follows: She was near the clothesline which was north of the house. She saw an automobile about 9:30 the morning of the accident traveling on the north-south road toward the north about at the lilac bushes on the west side of the road and south and east of the home of the witness. She observed the automobile until it entered the intersection and the collision occurred. The speed of it was about 50 miles per hour and she did not observe that the rate of the speed of it varied or changed during the time she saw it. The driver of the automobile was appellant. The other automobile involved in the collision came from the east. She estimated that when she first saw the westbound automobile it was probably a block or a block and a half east of the intersection but she also located it as near a cedar tree on the south of the east-west road 190 feet east of the place of the collision of the automobiles. The distance from the place of the collision to where a line from the clothesline near which Mrs. Best was standing to the northeast directly over the cedar tree mentioned above intersected the center of the east-west road was 340 feet. She watched the automobile as it traveled west to the intersection and to the place of collision and her estimate of its speed was approximately 50 miles per hour. She observed no change in its rate of speed while she watched it. The driver of the westbound automobile was the deceased. The witness saw it soon after she first saw the automobile of appellant. She first saw his automobile, the 1954 Ford, when it was near

the lilac bushes and about the same time she saw the automobile of the deceased, the 1950 Ford, coming from the east toward the intersection. There were trees and a lot of brush around her home on the west side of the north-south road. A mailbox was in front of her home along the north-south road and there were trees, brush, and lilac bushes 7 or 8 feet high at least along the west side of that road south of the mailbox. The witness said someone told her it was about 130 feet from the lilac bushes to the intersection and 30 or 40 feet north from the lilac bushes to the mailbox. The witness had operated automobiles with speedometers, had given attention to speed of automobiles while she was operating them and riding in them when driven by others, and she was able to estimate the speed of such a vehicle when it was moving in the range of her vision. She had driven north on the north-south road toward and approaching the intersection during the time she lived near it, she had made observations while so doing as to the visibility to the east of the intersection, and she knew that there were trees and brush substantially to the intersection that interfered with or prevented vision to the east of the intersection. The witness when she saw the automobiles the day of the collision was standing on the ground near the clothesline and the elevation of the surface of the ground at that location was about 5 feet higher than the surface of the road east of the intersection. She estimated the lapsed time from when she first saw the automobiles approaching the intersection until the collision as possibly 2 or 3 seconds. She said there were a lot of trees and brush along the south of the east-west road east from the intersection.

A member of the Nebraska Safety Patrol was notified of the collision of the automobiles and he arrived at the place of the accident at 9:55 a. m., December 26, 1957. The 1954 Ford was north and west of the center of the intersection about 90 feet from the place of the

collision in a field facing slightly to the southeast. It had been propelled across the ditch on the north side of the east-west road. Tracks from the place of the contact of the automobiles indicated that the 1954 Ford had gone in a substantially straight line in a northwesterly direction across the ditch into the field and turned around facing as above stated. The tracks stopped on the north edge of the east-west road and commenced again at the north outer edge of the ditch. There were no tracks in the ditch. The 1950 Ford was in the ditch along the north side of the east-west road facing north 74 feet west and slightly north of the place of the impact of the automobiles. The tracks which the investigator concluded were made by the 1950 Ford were from the place of the collision northwesterly to where it struck the north bank of the ditch, gouging out a depression in the earth, and the witness thought it either rolled over or swirled in going directly west from the point where it hit to where it came to rest. The witness did not certainly know how the 1950 Ford got from where it went into the ditch and hit the bank to the position where it finally came to rest. The witness said he drove some distance from the east toward the intersection on the east-west road the day of the accident and found the view relative to the intersection was about the same as the view of one traveling on the north-south road from the south toward the intersection, that is, that most of the vision was obscured. However, he said there were more trees and shrubbery on the north-south road south of the intersection and on the east side of it than there were on the south side of the east-west road east of the intersection and that vision of a traveler was more obscured on the north-south road. He drove from a distance south of the intersection north to it and observed that most of the view to the right or east was blocked and that trees and brush at the southeast part of the intersection out into the windbreak interfered with the view in that direction.

There was evidence that south of the intersection there was a private driveway east from the north-south highway that was 195 feet south from the south line of the east-west road to the center of the driveway; and that it was possible, if one was in the right position on the north-south highway looking to the northeast, to see the east-west highway for a distance of about 87 feet identified by a bush on the west and a cedar tree on the east. It was estimated that the tree was 189 feet from the intersection. A witness who lived east of the north-south road about 80 rods south of where the collision occurred questioned the evidence that the private driveway was 195 feet south of the intersection. He said he thought that was incorrect. He said it was about 125 to 130 feet from the fenceline south of the east-west road at the intersection south to the private driveway. He also said that if one was in the opening made by the driveway there was a time, but not for long, when he could catch a vision of the northeast to the cedar tree but then he would lose it: "If you move, it's closed off." This witness said he was about 80 rods away in his home when the collision occurred and it sounded like an explosion. He looked from a window toward the intersection and saw only a fog of dirt. He went there. The 1950 Ford was in the north ditch about 75 feet west of the intersection. It was on fire and he put out the fire. The 1954 Ford was northwest of the intersection in the field with its front to the south. Its motor was operating and he turned it off. Appellant was under the dash in his automobile. He appeared to have passed out and was in a daze. The first thing he said was he wanted to know what happened. The 1954 Ford made no tracks from the place of collision. It just scraped on the ground on its way into the field. Witness could not find where or when it turned around. There was glass in the intersection and the driveshaft of the 1954 Ford was wholly detached and was by the telephone pole at the northwest corner of the intersection. The

windshield was in the center of the road north of the intersection at least 100 feet. It was north and east of where the 1954 Ford finally stopped. The front of the 1950 Ford hit the north bank of the ditch north and west of the intersection and made a depression in the bank 6 or 8 inches deep. There were no other marks at or from that location. The gouged-out place in the bank of the ditch was 65 feet from the point of collision. The automobile either jumped or flipped and landed on its wheels where it came to rest. There is evidence the the speed of the 1950 Ford was, at the time of the collision, 67½ miles per hour; that the speed of the 1954 Ford at that time was 36 miles per hour; that the automobiles collided at right angles to each other; and that the front of the 1950 Ford struck the 1954 Ford on its right side approximately opposite the end of the rear seat.

There was substantially no damage to the front of the 1954 Ford. There was injury to its heavier parts including the framework, the body, the chassis, the frames on the under side of it, and to the rear springs. It was substantially destroyed. The rear suspension, that is the rear wheels and springs, was detached from it. The right part of the chassis frame was bent and twisted toward the left side and the left chassis frame had a large break in it. The crossmembers of the frame were broken. The front part, including the hump, was crushed from the right to the left. The braces over the hump were cracked. The back seat was twisted so that its right side was moved back a foot or a foot and a half. The whole body framework and the windshield posts were twisted, kinked, and bent. The right side of the top was crushed and distorted. The driveshaft was entirely detached and came to rest in the northwest part of the intersection. The windshield was broken off and was at least 100 feet north of the intersection. The chassis of the 1954 Ford was of box-type construction with numerous cross braces from one side of the frame to

the other and the material of these was high-grade mill structural steel made to resist tremendous external tensions and impacts. The front of the 1950 Ford was badly and extensively damaged and the parts thereof were driven back and to the right indicating that the principal place of contact by it with the 1954 Ford was at the left front of the 1950 Ford. The record does not detail the damage to it except what is exhibited by pictures of it.

The deceased left his home south of Alda between 8 and 9 o'clock the morning of the accident for the purpose of going to where his father lived a mile south and straight west of the place of the accident. Deceased was familiar with the road on which he traveled that day, the intersection where the collision occurred, and the surroundings of the intersection because he had frequently used the road. He was then 21 years of age. He was seriously injured in the collision and his injuries were the cause of his death that day.

Appellant was 22 years of age at the time of the accident. He was a 1954 graduate of Wood River high school, served in the Marine Corps thereafter until 1956, and assisted his father in his farming operations from the time of his discharge until the fall of 1957. He enrolled as a student in the Radio Engineering Institute of Omaha on September 11, 1957, and he had regular class attendance in that institution until he came home for the 1957 Christmas vacation except when he was ill in a hospital. His home was with his parents 1½ miles south of the place of the accident. He was operating the 1954 Ford with which he was familiar on what was called the main-traveled road to Wood River on an errand in anticipation of returning to school in Omaha the following day. He had frequently traveled the north-south road and the intersection where the collision occurred. There were trees and bushes along the east or right side of the road as he proceeded toward and to the intersection. These almost entirely obscured

his view to the northeast and to the east of the intersection except there were some places where a brief and generally imperfect view could be had to the northeast and any view of that kind was momentary and then entirely lost. A private highway to the east of the north-south road a considerable distance south of the intersection permitted a view to the northeast and of a part of the east-west road. He looked in that place as he went north the morning of the accident but there was no traffic to be seen by that observation. He made such observations as the conditions permitted as he proceeded north that day. The speed he was traveling was about 50 miles per hour but as he went north he gradually decreased it until he estimated it at 35 miles per hour when he reached the lilac bushes on the west or left side of the road which are mentioned above. He was at all times driving on the right side or lane of the road. It was about 3 car lengths, estimated as approximately 54 feet, south of the south line of the intersection, sometimes referred to as the fenceline, when there was some view past the obstructions at the southeast part of the intersection which could be made for traffic coming from the east. He then had the brake lightly applied and the speed of the 1954 Ford he thought was about 20 miles per hour. He looked to the east and could see about 3 car lengths, the same distance he estimated he was south of the east-west road. He saw no traffic from the east. He looked west and saw no traffic but he did see Mrs. Best standing near her clothesline. His 1954 Ford was moving toward the intersection in this brief interval. He looked east again as he came near or into the intersection and he for the first time realized there was an automobile traveling from the east toward the intersection. He thought he could avoid an accident by increasing his speed and turning his automobile sharply to the left which he attempted to do. That was the last he remembered. There is no evidence that the speed of the 1954 Ford was in-

creased when appellant attempted to use the accelerator or that his attempt in that regard had anything to do with causing the collision. Appellant testified he was in the intersection when he attempted to accelerate the speed and to turn to the left. In a deposition taken before the trial appellant said when he looked west and saw Mrs. Best he was about even with her mailbox which he estimated was probably 20 feet from the intersection. He later made an investigation of the situation and found he was mistaken as to the location of the mailbox and that in fact it was about 90 feet south of the intersection.

The issues in this case were which of the parties had the right-of-way at the intersection where the collision occurred and which of the parties was guilty of negligence which proximately caused or contributed to cause the accident involved herein. There is evidence that appellant had knowledge of all the conditions and hazards existing on the highways, the intersection of them, and the surrounding area concerned in the occurrence, the basis of this litigation; that he operated his 1954 Ford at a speed of about 50 miles per hour to and into the badly obstructed intersection where the collision occurred; that he did not decrease his speed; that there was an absence of any indication that he applied the brakes on his 1954 Ford; that in fact he stated he removed his foot from the brake pedal and attempted to accelerate the speed when he first realized that there was an automobile approaching from the east or the right; that the collision occurred immediately thereafter in about the center of the intersection which fatally injured the deceased; that the 1950 Ford was about the same distance from the intersection approaching it from the east and was traveling at about the same speed as appellant was; that he did not see the 1950 Ford until an instant before the collision; and that there was an opportunity for observation of the east-west road at least 54 feet east of the intersection by a traveler on the

north-south highway when he was a distance of 54 feet south of the intersection. The proof of negligence of appellant was such that reasonable minds could differ as to the correct inferences or conclusions to be deduced therefrom. It was sufficient to sustain a finding for appellee of the negligence of appellant as the proximate cause or a contributing cause of the collision.

Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496, states: "If there is any evidence which will sustain a finding for the litigant having the burden of proof in a cause the trial court may not disregard it and decide the case as a matter of law." See, also, Crunk v. Glover, 167 Neb. 816, 95 N. W. 2d 135.

In Bell v. Crook, 168 Neb. 685, 97 N. W. 2d 352, it is said: "All travelers are required to exercise due care in coming to and crossing an intersection of public highways."

Bezdek v. Patrick, 167 Neb. 754, 94 N. W. 2d 482, declares: "It is the duty of the driver of an automobile when approaching an intersection to look for other automobiles approaching and to see those within the radius which denotes the limit of danger." See, also, Nichols v. McArdle, *ante* p. 382, 102 N. W. 2d 848.

Appellants have not assigned herein that the evidence is not sufficient to sustain the verdict finding them guilty of negligence. They only argue, in support of their assignment, that it was error for the district court to deny their motion for a directed verdict at the close of the evidence, their motion for a judgment notwithstanding the verdict, and their motion in the alternative for a new trial, that the case should not have been submitted to the jury because the contributory negligence of deceased was as a matter of law more than slight in comparison with any negligence of appellants and that defeats any recovery by appellee. The issue of negligence of appellants was under the circumstances of this case one of fact for determination by the jury.

The 1950 Ford came to the intersection from the east which was to the right of appellant. There is evidence sufficient to justify a finding that the automobiles of the parties approached the intersection at approximately the same time because of which deceased may have had the directional right-of-way, but this was not established conclusively and which of the parties had the right-of-way at the intersection was a question for the consideration of the jury. If one assumed that deceased had it, there are, nevertheless, important considerations. In Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596, it is stated: "It was not intended to make a person entering a street intersection an insurer against a collision irrespective of the negligence of the other party." There is a presumption that deceased had and kept a lookout for traffic before and as he entered the intersection. There is no evidence to the contrary and all travelers are required to exercise due care in coming to and traveling upon an intersection of public highways. Bell v. Crook, *supra*. However, there is no presumption that deceased saw or did not see the 1954 Ford at or near the intersection. It is said in Spaulding v. Howard, 148 Neb. 496, 27 N. W. 2d 832: "It is a question of fact as to the negligence of the parties as to what they did or did not see, or what they should or could have seen." See, also, Bell v. Crook, *supra*. However, circumstances shown by the record permit a conclusion that deceased did not see the 1954 Ford traveling toward or in the intersection. There is evidence produced by appellee that the 1950 Ford traveled toward and to the place of the collision at about 50 miles per hour. An eyewitness was watching it continuously and saw no change or decrease in its speed. There was no indication observed that it varied its course or that its brakes were applied. There were no tire or skid marks in the intersection at or near the place of the impact showing the use of brakes east of the place of the accident. There is evidence the automobiles collided at right angles to each

other. There was also evidence introduced by appellants that the speed of the 1950 Ford was more than 65 miles per hour as it traveled to the place of the collision. There may be some corroboration of this by the character, nature, and extent of the destruction of the 1954 Ford which was struck on its right side about opposite the back seat. With the exception of the extreme front it was literally disintegrated. The facts of the unusual performance of the 1950 Ford after the collision until it came to rest are significant of its great speed and momentum at the time of the impact.

In Long v. Whalen, *supra,* this court said: "It is a part of the law of the road in this state that when two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed. * * * One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances. He has the right-of-way over traffic approaching on his left, but he is not thereby relieved from the duty of exercising ordinary care to avoid accidents. * * * The drivers of vehicles approach an intersection at approximately the same time whenever the two vehicles are in such relative position that upon appraisal of all factors it should appear to a man of ordinary prudence approaching from the left that there is danger of collision if he fails to yield the right-of-way."

Bell v. Crook, *supra,* contains the following: "The requirement in this state is that when a motorist enters an intersection of two highways he is obligated to look for approaching motor vehicles and to see those within that radius which denotes the limit of danger. If he fails to see a motor vehicle not shown to be in a favored position, the presumption is that its driver will respect the right-of-way of the motorist and the question of his contributory negligence in proceeding to cross the intersection is a question for the jury."

The appellee does not contend that the evidence in this case does not make the issue of contributory negligence of deceased a question of fact to be decided by the jury. Appellee says in her brief that deceased as he approached the intersection from the east could have seen an automobile on the north-south road traveling toward the intersection; that there were several places which were available to him for this purpose; and that if he looked, and it is presumed he did, and did not see the 1954 Ford which was not in a favored position, any negligence of the deceased was for determination by the jury as shown by the authorities cited by appellee. Appellee also argues that a finding could properly have been that the deceased had been traveling 50 miles per hour; that he looked to the left and saw appellant had decreased the speed of his 1954 Ford; and that any negligence from such facts necessarily was for the jury to determine. The conclusion of the argument of appellee on the issue of contributory negligence is that whether or not any of the acts of the deceased preceding the accident constituted contributory negligence was at most a question for the jury. It is indisputable, therefore, that the concession of appellee by these arguments and conclusion referred to above is that it was an issue for the jury to determine whether or not the acts or omissions of the deceased as shown by the evidence constitute contributory negligence which proximately caused or directly contributed to the cause of the collision. This was the conclusion of the trial court and it was correct in submitting that issue to the jury for solution. The argument of appellants is that contributory negligence of deceased was established as a matter of law and this is the basis of their assignment that the verdict is not sustained by the evidence and that the case should have been decided by the trial court in favor of appellants as a matter of law. Appellants are incorrect in this and their argument and conclusion cannot be sustained. The issue of contributory

negligence in this case was one of fact for solution by the jury and not the court.

Appellants argue that the trial court abused its discretion by directing an improper question to a witness produced by appellants during the cross-examination of the witness and by making prejudicial remarks in the presence of the jury concerning the improper question, and that thereby an attack was made upon the credibility of the witness and the value of his testimony. They made an objection to the trial court's "interposing of questions and arguing with the witness on the stand." The record does not exhibit any other objection made by appellants to any of the questions asked or comments made by the trial judge. It is not necessary to determine the contention of appellants in this regard because of the disposition made of this appeal as hereafter stated. A recurrence of the matter complained of is not probable on any retrial of the case.

A contention made by appellants is that the failure of the trial court to instruct the jury concerning limitations of speed of vehicles contained in section 39-723, R. S. Supp., 1957, was error. This section prohibits the operation of a motor vehicle on a highway in a rural area at a "speed greater than is reasonable and proper, having regard for the traffic, the use of the road, and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person * * *." Appellants concede the trial court did instruct the jury as to the limitations of speed of vehicles on a highway as contained in section 39-7,108, R. R. S. 1943. It states a prohibition in this manner: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." The language of the instruction given by the trial court contained the language last quoted above and the words thereof "under the conditions then existing" were inclusive of and definite enough to include the import of the words "the condition of the road" contained in

section 39-723, R. S. Supp., 1957. Appellants emphasize that deceased was traveling upon the lesser traveled of the two roads and that he was familiar with them and the intersection. The record contains no proof that there was any less traffic or use of the east-west road than there was on the north-south road. There is no showing of the traffic or use of either of the roads except the deceased was traveling on the east-west road and appellant was traveling on the north-south road the day of the collision; that they had previously used the roads; and that they were familiar with the intersection. The objection of appellants in this respect is not a valid one.

The correctness of an instruction given the jury on the subject of right-of-way at an intersection of highways is not contested except appellants say it was error for the trial court to omit therefrom, as it did, the provision of the statute that "The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have * * *." § 39-751, R. R. S. 1943. Appellants requested two instructions on this subject. The first included the provision last quoted above. It was refused by the trial court. The other omitted the quoted provision and the trial court gave an instruction to the jury in the exact language of the instruction proposed by appellants. They may not complain that the district court accepted that version of the law as proposed by them even though it was an incorrect or incomplete statement of the law. If a litigant requests more than one inconsistent instruction he may not complain because the court adopts and gives one of them and refuses the other which was inconsistent with the one given. A litigant who presents to the court different and antagonistic instructions, so that if one is given consistency requires that the other be refused, cannot be heard to complain of the action of the court in erroneously deciding between the two. A litigant may not be heard to question the

correctness of any action which he requested or caused. In Missouri P. Ry. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, this court said: "Where several instructions to the jury in the trial of a case are requested, some of which are inconsistent with the others, and involve different theories of the case, a party submitting such instructions can not complain of the trial court in adopting one of the theories of the case, and giving the instruction applicable thereto, and refusing those which were inconsistent with the ones given. * * * It is a sound and salutary principle that a party can not be heard to complain of an error which he himself has been instrumental in bringing about." See, also, Pahl v. Sprague, 152 Neb. 681, 42 N. W. 2d 367; Schlueter v. School Dist. No. 42, 168 Neb. 443, 96 N. W. 2d 203.

The substance of a part of the charge to the jury was that it was the duty of a motorist to have his vehicle under reasonable control so as to enable him to avoid colliding with other vehicles if the drivers thereof were exercising due care. It was the duty of a motorist to keep a reasonably careful lookout so that he might be able to avoid a collision with other vehicles lawfully upon the highway. It was for the jury to find from the evidence whether these duties were violated by the deceased or appellant; and if the jury found that there was such a violation, it would not in and of itself constitute negligence but would be a circumstance which the jury could take into consideration in deciding whether the deceased or appellant was guilty of negligence. The instruction is attacked by appellants as error because of their belief that the failure of deceased to look to his left in approaching the intersection when by looking he could have seen and avoided the collision which occurred was more than slight negligence as a matter of law and prevents any recovery by appellee. Appellants tendered an instruction in harmony with their belief in this respect and its refusal is a part of their complaint. There is a fatal error in the argument of

appellants. There is no proof that deceased did not look or that he did not have and keep a reasonable lookout as he approached and entered the intersection. It is because of this presumed that he did and that he in that respect used due care. Bush v. James, 152 Neb. 189, 40 N. W. 2d 667; Bell v. Crook, *supra*. It is also true, as the instruction of the trial court stated, that the violation of a safety regulation established by statute or ordinance is not generally negligence as a matter of law but such a violation is a fact which may be considered in connection with all the other evidence in the case in deciding the issue of negligence. Armer v. Omaha & C. B. St. Ry. Co., 151 Neb. 431, 37 N. W. 2d 607. The complaint of appellants under the circumstances of this case is without foundation.

Appellants tendered an instruction concerning the doctrine of sudden emergency. It was refused by the trial court and its action is assigned as error. The first mention of a sudden emergency in this case was when the instruction relating thereto was requested. This doctrine cannot be invoked in a negligence case unless there is evidence to support the conclusion that a sudden emergency actually existed and it cannot be invoked by one who has brought that emergency upon himself by his acts or omissions or who has not used due care to avoid it. Stanley v. Ebmeier, 166 Neb. 716, 90 N. W. 2d 290. The present case does not conform to the specifications of sudden emergency. It involves only issues of negligence, contributory negligence, and an application of the doctrine of comparative negligence.

The evidence is such that a finding that either the deceased or appellant had the right-of-way at the intersection would have been sustained. It was an important question and one for jury determination. Appellants requested that the jury be instructed that a motorist having the right-of-way may not because of that fact proceed with disregard of the surrounding circumstances nor is he thereby relieved from the duty of exercising

ordinary care to avoid an accident. This request correctly stated a recognized rule of law. Maska v. Stoll, 163 Neb. 857, 81 N. W. 2d 571. The jury may have believed that if deceased had the right-of-way at the intersection, this fact assured him safe passage across it at all events without exercise of caution or prudence on his part. The tendered instruction could not have prejudiced appellee because it was general and applied equally to the conduct and duty of deceased and appellant. In the trial of an action concerning a collision of automobiles on an intersection of highways which involves issues of negligence and contributory negligence this court has said that the jury should be fully and precisely instructed as to the relative and reciprocal rights and duties of the operators of automobiles in entering and using the intersection. Bezdek v. Patrick, *supra*. The instruction requested by appellants should have been given to the jury.

Appellants in their detailed specifications of contributory negligence asserted: Deceased failed to decrease his speed when approaching and crossing the intersection, when special hazards existed with respect to other traffic, and where special hazards existed by reason of highway conditions, contrary to section 39-7,108, R. R. S. 1943; and that deceased operated his automobile until the collision at an excessive, dangerous, and unlawful speed having regard for the traffic, use of the road, and the condition of the road and at a speed such as to endanger life and limb of other persons, that is to say in excess of 65 miles per hour, contrary to sections 39-723, R. S. Supp., 1957, and 39-7,108, R. R. S. 1943.

The instruction of the court concerning the plea made by appellants of contributory negligence of deceased said that appellants stated: That deceased failed to exercise ordinary and reasonable care while approaching and entering an intersection where his view was obstructed; failed to keep and maintain a proper lookout; operated his automobile on a highway at a greater speed

than was reasonable and proper under the conditions existing toward the east of the intersection on the south side of said highway; failed to apply his brakes and avoid a collision with the automobile operated by appellant; failed to yield the right-of-way to appellant who first entered the intersection; and that the negligence of deceased was more than slight when compared with any negligence of appellant.

The instruction completely eliminated from the consideration of the jury the specifications of negligence of deceased that he failed to decrease his speed which was in excess of 65 miles per hour when approaching and crossing the intersection; that he failed to decrease his speed where special hazards existed by virtue of highway conditions; and that the speed of the automobile of deceased was excessive, dangerous, and unlawful having regard for the use and condition of the road. These specifications of negligence were each pleaded as contributory negligence of deceased and they were each supported by evidence. The jury was given an instruction that appellee had charged that appellant had failed to decrease the speed of his automobile so as to enable the automobile of deceased to pass through the intersection with safety, and the omission from the instruction that appellant had alleged a similar failure of deceased may have misled the jury, causing it to apply the recited requirements of the law only to appellant and not to deceased. In order for the jury to have applied the rules contained in the given instruction relative to reduced speed to deceased and for the jury to have found him guilty of negligence in that regard, the jury would have had to ignore and circumvent the charge of the trial court that before appellants could avail themselves of the defense of contributory negligence they must have proved that deceased was guilty of negligence "* * * in one or more of the particulars set out in their answer * * *." It cannot be assumed that the jury would disregard that charge. The instruction of the trial court as

to what appellants alleged as to the speed of the automobile of the deceased was that he operated his vehicle on a highway "at a greater speed than was reasonable and proper under the conditions existing towards the east of the intersection * * *." This was too restricted, general, and an unfair representation of the allegations of the speed of the automobile of deceased. It was plainly alleged in the answer that the speed of the automobile of deceased was in excess of 65 miles per hour and there is evidence supporting that allegation. It is the duty of the trial court without a request to instruct the jury as to each issue presented by the pleadings and supported by evidence. A litigant is entitled to have the jury charged as to his theory of the case as shown by pleading and evidence and a failure in this respect is prejudicial error. McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb. 497, 37 N. W. 2d 923; Maska v. Stoll, *supra;* Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877; Phillips v. State, 167 Neb. 541, 93 N. W. 2d 635; Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551.

A part of the charge to the jury states: "By 'slight negligence' is meant small or little negligence" and "By 'gross negligence' is meant great or excessive negligence." This court disapproved an instruction containing the language quoted above in cases of the same character as this litigation. Bezdek v. Patrick, *supra;* Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774.

The charge of the trial court in this case did not inform the jury by any language contained therein that if, in comparing the negligence of the parties, the negligence of deceased was found to exceed slight negligence in any degree under the circumstances or if the negligence of appellant was found to be in any degree less than gross negligence under the circumstances, then the negligence of deceased, however slight, would defeat any recovery by appellee. The instruction given on this subject stated: "If you find that both drivers were

negligent, the plaintiff (appellee) cannot recover if upon comparison of the negligence of Richard F. Ripp (deceased) with that of Charles Riesland (appellant) you find that the negligence of Charles Riesland was less than gross." If there had been inserted therein after the second or last appearance of the word "find" the clause: "deceased's negligence was more than slight or" then the instruction would have been the same as the standardized instruction No. 64 adopted by the association of district judges of the state. However, the clause: "deceased's negligence was more than slight or" was entirely omitted from the instruction given to the jury.

Section 25-1151, R. R. S. 1943, in part provides that in a case of this class "* * * the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison * * *." The interpretation of the comparative negligence act made in Morrison v. Scotts Bluff County, 104 Neb. 254, 177 N. W. 158, which has been continuously accepted by this court, is in part: "If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery." See, also, Murray v. Pearson Appliance Store, 155 Neb. 860, 54 N. W. 2d 250.

Mitchell v. Missouri P. R. R. Corp., 114 Neb. 72, 206 N. W. 12, states: "The trial court attempted to cover this subject in the giving of instructions * * *. In these instructions however the element referred to in the following language: 'Or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, the contributory negligence of plaintiff,

however slight, will defeat a recovery' is wholly omitted. In instruction * * * requested by defendant in the court below and refused this element was substantially covered. The failure of the court to embody in his instructions the element above quoted thus constitutes error. In view of the fact that the controlling issues in this case are certainly the matter of negligence and contributory negligence, the error is deemed prejudicial and necessitates the reversal of the case."

Gibson v. Kelkenny, 112 Neb. 524, 199 N. W. 838, states: "The instructions quoted are erroneous for the reason they do not permit the barring of a recovery by plaintiff on account of contributory negligence, if any, unless it was gross in comparison with that of the defendant. It is when the contributory negligence of plaintiff is slight that a recovery by him is not barred. * * * It is clear from the instructions that plaintiff was permitted to recover damages on conditions not sanctioned by law and on terms not accorded to other litigants similarly situated. There does not seem to be any substantial ground for holding that the error was not prejudicial to defendant."

In McMullen v. Nash Sales Co., 112 Neb. 371, 199 N. W. 721, an instruction to the jury was that if it found the plaintiff's failure to exercise due care was not the sole cause of the accident but only contributed thereto in a less degree than that of the truckdriver (who was employed by Nash Sales Co.), then that fact would not defeat a recovery on the part of plaintiff if the jury further found that the truckdriver was "guilty of gross negligence as compared with the negligence of the plaintiff, if any * * *." The court said: "The effect of this instruction was to permit a recovery for damages if the truck-driver was guilty of gross negligence as compared with the negligence of McMullen, if any. The comparison authorized by the instruction is between 'gross negligence' of Jones and 'negligence' of McMullen, while the latter's conduct, according to the statu-

tory rule, must be tested for the purpose of his recovery by the degree of 'slight negligence.' * * * For the purpose of determining liability for damages, where both parties are guilty of negligence in some degree, 'slight negligence' is not the same as 'negligence.' Under the instruction in controversy, when considered with the evidence and the statute, the term 'negligence of the plaintiff' may have included 'gross negligence' in the minds of the jury. The instruction was clearly erroneous and permitted a recovery not authorized by law. Owing to the divergent views of the witnesses as to the facts in controversy, there does not seem to be any substantial ground for holding that the error was not prejudicial to the Nash Sales Company."

The omission of the element: "or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery" from the instruction in McMullen v. Nash Sales Co., *supra*, would not seem to be any more fatal than the omission of the element: "deceased's negligence was more than slight or" from the instruction in this case. The omission discussed above was an error and was prejudicial to appellants.

The correctness of the instruction which advised the jury that before appellants could have the benefit of the defense of contributory negligence of deceased they must have proved by the weight of the evidence that the contributory negligence of deceased was more than slight when compared with the negligence, if any, of appellants, is challenged by them. The comparative negligence act says contributory negligence of plaintiff shall not bar recovery when it is slight and the negligence of defendant is gross in comparison, but the contributory negligence of plaintiff shall be considered by the jury in mitigation of damages. § 25-1151, R. R. S. 1943. This statute was interpreted in Morrison v. Scotts Bluff County, *supra*, in this manner: "The true rule

is that, if plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight and the negligence of defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant falls in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery." That interpretation has been frequently and was recently repeated and applied. Murray v. Pearson Appliance Store, *supra;* Brackman v. Brackman, *supra.*

Roby v. Auker, 151 Neb. 421, 37 N. W. 2d 799, states: "Under the comparative negligence law * * * the words 'slight' and 'gross' as therein used are comparative terms and the intent of the statute is that the negligence of the parties will be compared one with the other in determining questions of slight and gross negligence." The opinion in that case quotes the interpretation of the statute made in Morrison v. Scotts Bluff County, *supra,* and concluded: "It will be noted that the foregoing rule is predicated on a comparison of the negligence of the parties in determining the liability of both the plaintiff and the defendant, that is, the question of slight or gross negligence as used in the statute are both dependent upon a comparison of the negligence of the parties, one with the other." This announcement therein is definite that all questions of slight or gross negligence in cases in which the comparative negligence act is applicable are to be determined not by satisfying a rule of burden of proof but by comparison made by the jury, or in its absence by the court, of the negligence of the parties, one with the other. Brackman v. Brackman, *supra,* made the most recent consideration of this subject and therein the language last quoted is approved.

Bezdek v. Patrick, *supra*, declares: "The words 'slight' and 'gross' as employed in the comparative negligence act of this state are comparative terms. The test the statute provides is not based upon absolute degree of negligence but rather upon a comparative test of the relative degrees of negligence between the parties. The negligence of the plaintiff or defendant is not to be evaluated as slight, gross, or otherwise, standing alone. The criterion by which the degree of negligence of plaintiff is to be measured is the extent thereof by comparison with the negligence of defendant."

These decisions demonstrate that if a plaintiff produced evidence which, if believed, shows negligence of the defendant as alleged by the plaintiff and defendant has made proof sufficient to support a finding of negligence of plaintiff in the respect claimed by defendant, there is not thereafter any matter of burden of proof in the case but the question of whether the negligence of plaintiff is slight or more than slight or whether the negligence of defendant is gross or less than gross is determined by a comparison by the court or jury of the negligence of the parties under the circumstances, one with the other. The criterion by which the degree of negligence, slight or more than slight, of the plaintiff is to be decided is the extent thereof by comparison with the negligence, gross or less than gross, of the defendant. Likewise the degree of negligence of defendant is to be determined by comparison of his negligence with the negligence of the plaintiff. This is the meaning and effect of Murray v. Pearson Appliance Store, *supra:* "After the parties establish and the jury, under proper instructions, finds the respective parties guilty of actionable negligence and contributory negligence the responsibility is then on the jury to make the comparison as contemplated by the statute. This comparison is to determine the rights of the parties to recover, if at all, and the extent thereof. In this respect there is no burden of proof on either party but solely a duty on the part

of the jury to make the proper comparisons on the evidence before them. The court should give the jury an instruction in which the correct basis for making the comparison is set forth."

The instruction upon this subject given in this case invaded the province of the jury to make the comparison the statute required to ascertain whether the negligence of deceased was slight or more than slight. It placed a burden upon appellants greater than the law imposed and permitted a recovery not authorized by law. The instruction was erroneous and prejudicial.

The judgment should be and it is reversed and the cause is remanded to the district court for Hall County for further proceedings according to law.

REVERSED AND REMANDED.

OLIVER ERSKINE ET AL., APPELLANTS, V. THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, TRUSTEE, ET AL., APPELLEES.
104 N. W. 2d 285

Filed July 1, 1960. No. 34672.

1. **Wills: Estates.** A devise which conveys property in fee simple, to which are attached conditions for the violation of which a forfeiture may be declared by contingent devisees, creates an estate in fee simple subject to conditions subsequent.
2. **Estates.** Estates upon condition subsequent, which, after having become fully vested may be defeated by a breach of condition, are not favored in law.
3. **Wills: Estates.** Conditions subsequent contained in a devise of real estate will be construed most strongly against contingent devisees and a forfeiture will not be enforced unless clearly established.
4. ———: ———. To constitute a breach of condition subsequent in a devise relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition.
5. ———: ———. In such a case it is not enough to show that the letter of the condition is violated; it must appear that its

true spirit and purpose have been intentionally disregarded by the devisee.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Affirmed.*

Frederick J. Patz and *Ralph H. Gillan,* for appellants.

Cline, Williams, Wright & Johnson, Sam C. Zimmerman, and *Robert E. Johnson, Jr.,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is a suit against the Board of Regents of the University of Nebraska to recover possession of 320 acres of land which had been devised to such board by the will of Cora E. Rogers, deceased, subject to specified conditions. Plaintiffs are named devisees of the real estate in the event of the failure of the Board of Regents to comply with the conditions attached to the devise. Plaintiffs alleged a failure of compliance on the part of the Board of Regents and asserted title to the lands as contingent devisees. The trial court found that the Board of Regents had complied with the terms of the will of Cora E. Rogers, deceased, and dismissed the petition at plaintiffs' costs. The plaintiffs have appealed.

The evidence shows that Cora E. Rogers died on June 29, 1945, leaving a will by which the lands involved herein were devised to the Board of Regents for use as an experimental farm for the promotion of agriculture and for the benefit of students attending the College of Agriculture of the University of Nebraska. The portion of the will involved in this litigation provides: "Said agricultural lands shall be known as the 'Rogers Memorial Farm', a memorial to both my son and husband, and shall be enclosed with a fence of suitable permanent construction, using concrete posts with a gateway, or gateways, suitably marked with said name; said lands

shall be operated by said Trustees as an experimental farm for the promotion of agriculture and the benefit of students attending the College of Agriculture of the University of Nebraska. The Board of Regents of the University of Nebraska shall provide, out of the income from said property, two scholarships in the College of Agriculture of not less than Five Hundred Dollars ($500.-00) annually. Said Trustees shall have no power or authority or right to ever sell or mortgage said farm, or contract any debt, or debts, of any kind or nature whatsoever, which shall ever for any reason whatsoever divert said trust from the purpose herein determined, and the property herein set aside for said trust shall never be subject to any mortgage, mechanics' lien or other encumbrance, lien or devise of any nature whatsoever. Said Trustees shall keep the farm in good state of cultivation.

"In the event of any attempted sale, lease or mortgage of said property, or failure to carry out any of the above requests, or in the event The Board of Regents of the University of Nebraska do not accept said gift within six (6) months from and after my death, said farm shall go to the following named persons, to be divided share and share alike: * * *."

Plaintiffs contend that the Board of Regents failed to erect a gateway with suitable markings in accordance with the terms of the will. The evidence shows that identical pylons were erected on each side of the entrance to the farm. Each pylon was approximately 8 feet wide, 3 feet thick, and 6 feet high, with Indiana limestone bases and capstones. The pylons were faced on all four sides with cherry red face brick. A white marble plaque was placed on the face of each pylon, each of which was approximately 26 inches by 16 inches. The plaque on the left pylon was inscribed "ROGERS MEMORIAL FARM UNIVERSITY OF NEBRASKA." The plaque on the right pylon was inscribed "GIVEN BY CORA E. ROGERS IN MEMORY OF EDGAR A.

ROGERS HUSBAND EDWARD ALFRED ROGERS SON." The gateway was landscaped with trees and shrubs. The structures clearly are in accordance with the terms of the will. The contention that noncompliance was established because a swinging gate was not installed or fences built up to the pylons is without merit. The purpose of the gateway was to indicate to the public the gift of the farm as a memorial to the husband and son of the deceased. The structures fully accomplished the purpose of the deceased as disclosed by the provisions of her will.

The plaintiffs assert that the Board of Regents failed to enclose the farm with a fence of suitable permanent construction and use concrete posts, as prescribed by the will. The evidence shows that the land was fenced and concrete posts used. The fence has been maintained with concrete posts except for one 330-foot section on the east side of the land. This section of the fence was in the area where surface waters drained from the land and is subject to flooding after heavy rainfall. Concrete posts were found to be impractical and steel posts were used as replacements in this section of the fence. While the use of steel posts in this section of the fence was not literally in compliance with the provision of the will it is a substantial compliance under the existing conditions and is insufficient to require a forfeiture of the devise to the Board of Regents. We find the evidence concerning the construction of the fence to be insufficient to sustain a forfeiture of the devise to the Board of Regents for a breach of the condition contained in the will.

Plaintiffs assert a violation of the condition in the will that two scholarships in the College of Agriculture of not less than $500 shall be provided annually. Whether or not this provision means two scholarships totalling $500 annually, or two scholarships of $500 each, is not clear. In any event, a forfeiture will not ordinarily be declared where the trustee in good faith adopts one of

two interpretations equally reasonable. The evidence shows that scholarships were not granted the first 2 years after the Board of Regents took possession of the land, the income from the farm being used to meet other conditions of the will. In 1948 two scholarships of $250 each were granted, although one-half of one scholarship was not paid because of the graduation of the grantee at mid-year. No scholarships were granted in 1949. In 1950 two scholarships of $250 each were granted. In 1951 and each year thereafter two scholarships of $500 each have been granted. While the records show that in the early years of the trust there were no scholarships granted, or were granted in an amount less than $500, two scholarships of $500 each have been granted since 1951. After reviewing all the evidence dealing with the facts and circumstances, and the lapse of almost 10 years since the claimed breaches of condition, we conclude that the evidence will not sustain a forfeiture. The evidence shows that expenses exceeded income during the period from 1946 to 1957. While it is true that such expenses include many items of capital investment, we cannot say that the Board of Regents intentionally or willfully violated the scholarship provision of the will. There has been a substantial compliance with this condition of the will and actual compliance for the last 10 years. Under such a situation a forfeiture will not be declared.

The evidence shows that the scholarships were limited to senior men in the College of Agriculture for several years and then made available to men students in their senior and junior years. Plaintiffs contend this to be a violation of the will. We point out that the will does not specify the class of students eligible to receive these scholarships. It was clearly left to the discretion of the Board of Regents to make this determination. The evidence shows that the granting of these scholarships was integrated into other scholarship programs. It shows, also, that the Board of Regents deemed it advis-

able to limit the scholarships to students who had already made good records in the College of Agriculture and who were more certain to complete the course and make contributions to the scientific development of agriculture in the state. We find that the limiting of scholarships to senior and junior men students is based on reasonable considerations and clearly within the terms of the will.

The primary contention advanced by the plaintiffs is that the Board of Regents has not used the farm as an experimental farm for the promotion of agriculture, or used it for the benefit of students attending the College of Agriculture, or kept the farm in a good state of cultivation, all as required by the terms of the will. The record is replete with evidence on these subjects, expert and otherwise. We shall limit our discussion to a general consideration of the evidence and the findings to be made therefrom.

Prior to the time the Board of Regents took possession of the farm under the terms of the devise it was used for the growing of corn, wheat, oats, and what is usually termed row crops. The Board of Regents discovered that the land, which was rolling in character, was subject to erosion by surface waters. It was determined that there had been a loss of top soil in excess of 25 percent on a substantial portion of the land and that the top soil was progressively being depleted. The Board of Regents, acting through the College of Agriculture, thereupon requested the services of the United States Department of Agriculture Soil Conservation Service in developing a comprehensive conservation program. The topography of the land was examined, the extent of the erosion determined, and the degree of the depletion of the top soil carefully estimated. From this a plan of conservation was formulated. In March 1946 a contract was entered into with the Lancaster Soil Conservation Service for the carrying out of the plan of conservation agreed upon. This included a terracing of the slopes, the elimination of gullies and drainage ditches

not required, the grassing of remaining waterways, and the planting of grasses to build up the soil and resist further depletion by erosion.

Pursuant to the plan agreed upon and the advice of technicians in farm-land conservation and soil structure and fertility, a program of terracing was carried out. The number of gullies was thereby decreased from 11 to 3. The remaining 3 were grassed to prevent washing. The lands with top-soil loss were planted to brome grass and alfalfa. In 1948 the planting of brome grass and alfalfa was commenced and its planting progressively increased to 178 acres. From 1952 to 1955 the number of acres of brome grass and alfalfa remained at this amount. Subsequent to 1955 a system of crop rotation was commenced which reduced the acreage of brome grass and alfalfa and increased the acreage in annual crops. In 1958 the amount of brome grass and alfalfa was 109 acres and the amount of annual crops was 156 acres. The record is replete with evidence that the planting of brome grass and alfalfa to eliminate the erosion of the land and to build up the top soil was a proper conservation practice necessary to be followed if the farm was to reach its potential productivity.

The necessity for the planting of brome grass and alfalfa having been determined as the proper means for building up the soil resources and productiveness of the farm, the Board of Regents concluded that the farm should be used as an experiment farm for a beef cattle breeding research program. The considerations for this conclusion were the importance of the beef cattle industry in this state, the need of facilities for beef cattle breeding research, and the necessity for keeping a large portion of the farm in grass. With this end in view the farm was stocked with beef cattle and the farm devoted mainly to beef cattle breeding research.

The plaintiffs do not deny that the farm is being used as an experimental farm for beef cattle breeding research. They do contend that the farm has not been

kept in a good state of cultivation in accordance with the condition attached to the devise. There is little dispute in the facts, the issue hinging largely on the meaning of the term "good state of cultivation," as used in the will. The issue in turn resolves itself into the question as to whether or not the seeding of land to brome grass and alfalfa is in keeping with the requirement that the farm be kept in a good state of cultivation.

It is our conclusion that a good state of cultivation as used in the will is synonymous with good husbandry. It includes good management and care, and usually, but not always, implies the planting of annual crops. The terracing of lands, the preparation of seed beds, the application of fertilizers, and the harvesting of crops, whether annual crops or perennial grasses such as brome grass and alfalfa, is a cultivation of the land within the meaning of a "good state of cultivation" as used in the will. The plaintiffs assert that to cultivate land means to stir or turn the soil annually and that the planting of non-native grasses is violative of the condition. The evidence indicates that the word cultivation does have such a colloquial usage. But the meaning of cultivation as shown by its dictionary definition and its ordinary use in the field of science in agriculture indicates a much broader meaning. It connotes a directed use of land as contrasted to its use in its natural state. So defined, the planting of grasses for the purposes heretofore detailed is a cultivation of the land. The evidence is clear that under this definition the farm has been maintained in a good state of cultivation.

The evidence is not disputed that the research data accumulated by the use of the farm as a beef cattle breeding research experiment station has been for the benefit of students attending the College of Agriculture. Students have inspected the farm and the experiments being carried on. Cattle have on occasion been removed to the College of Agriculture campus for instructional purposes. In addition thereto the farm has been used

to instruct students in proper conservation practices and soil building, the use of grass cover to eliminate or decrease erosion, the root structure of various grasses, particularly brome grass and alfalfa, and the resulting benefits to depleted soil. The evidence clearly demonstrates that the farm was used for the benefit of students attending the College of Agriculture. It can hardly be disputed, as the evidence shows, that cattle raising is an agricultural pursuit and within the meaning of the expression "promotion of agriculture," as that term is used in the will.

The plaintiffs take the position that the income from the farm has been reduced by the seeding of a large part of the land to brome grass and alfalfa. Plaintiffs frankly admit that they do not believe in conservation programs and infer that the conditions of the will have been violated because of the departure from the traditional manner in which the land had been farmed previous to its devise to the Board of Regents. The designation of the farm as an experiment station implies changes in the method of operation and negates any idea that it was to be operated primarily for income purposes. It is evident from the terms of the devise that the main purposes of the testatrix were to provide a suitable memorial to her son and husband who had predeceased her, and to have the land used for the promotion of agriculture and for the benefit of students at the College of Agriculture. The specific use to which it was to be put within the general use prescribed was not designated. The specific use was left to the judgment of the Board of Regents. We conclude that the Board of Regents has substantially complied with the terms of the devise and accomplished the purposes of the testatrix as set forth in the will. Such being true, no basis for a forfeiture of the devise exists.

The foregoing conclusions are supported by the following rules of law: A devise which conveys property

in fee simple to which are attached conditions for the violation of which a forfeiture may be declared by contingent devisees, creates an estate in fee simple subject to conditions subsequent. Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117. Estates upon condition subsequent, which, after having become fully vested may be defeated by a breach of condition, are not favored in law. Such condition will be liberally construed to avoid a forfeiture. Majerus v. Santo, 143 Neb. 774, 10 N. W. 2d 608; Plummer v. Fie, 167 Neb. 367, 93 N. W. 2d 26. To constitute a breach of condition subsequent in a devise as to maintenance or use of land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. Burrows v. Madison Park & Pleasure Drive Assn., 177 Wis. 639, 189 N. W. 535; St. Clara College v. City of Madison, 250 Wis. 538, 27 N. W. 2d 745; Koonz v. Joint School Dist. No. 4, 256 Wis. 456, 41 N. W. 2d 616. It is not enough to show that the letter of the condition is violated, but it must appear that its true spirit and purpose have been intentionally disregarded by the devisee. Rose v. Hawley, 141 N. Y. 366, 36 N. E. 335.

Under these fundamental rules, and the facts and circumstances shown by the evidence, we conclude, as did the trial court, that the Board of Regents has substantially complied with the conditions imposed on it by the will of Cora E. Rogers and that no basis exists for a forfeiture of the estate devised to such board.

AFFIRMED.

IN RE APPLICATION OF GEORGE NEUSWANGER ET AL. GEORGE NEUSWANGER ET AL., APPELLEES, V. EARL HOUK, DOING BUSINESS AS WESTERN NEBRASKA TRANSPORT SERVICE ET AL., APPELLANTS.

104 N. W. 2d 235

Filed July 1, 1960. No. 34725.

1. **Constitutional Law: Public Service Commissions.** The power of the Nebraska State Railway Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution. Such powers are plenary and self-executing in the absence of specific legislation on the subject.
2. ———: ———. Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment.
3. **Public Service Commissions: Appeal and Error.** The Nebraska State Railway Commission is clothed with legislative, administrative, and judicial powers, and this court has jurisdiction to review the orders and regulations of the commission on appeal.
4. ———: ———. On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made.
5. **Public Service Commissions: Motor Carriers.** Should the Nebraska State Railway Commission, after hearing, revoke, change, or suspend the certificate of public convenience and necessity, it must do so for willful failure to comply with the provisions of the act or with any lawful rule or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of such permit or certificate. § 75-238, R. R. S. 1943.
6. ———: ———. The term "willful failure," as used in section 75-238, R. R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of.
7. ———: ———. Where an application is made for the transfer of operating rights under the provisions of section 75-240, R. R. S. 1943, the question of whether or not such operating rights are dormant, within the meaning of the foregoing statute, relates to the time the application is made, a hearing is held thereon, and for a reasonable length of time immediately prior thereto.

8. ———: ———. Where a certificate of public convenience and necessity is not dormant it may be transferred on approval of the Nebraska State Railway Commission under reasonable rules and regulations to be prescribed by it, (1) if the transfer will be consistent with public interest, (2) if it will not unduly restrict competition, and (3) if the transferee is fit, willing, and able to perform the service proposed. § 75-240, R. R. S. 1943.
9. ———: ———. In determining the issue of public convenience and necessity, in cases where new or extended operating rights are sought, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest.

APPEAL from the Nebraska State Railway Commission. *Affirmed in part, and in part reversed.*

Viren, Emmert, Hilmes & Gunderson, C. J. Burrill, Eleanor Knoll Swanson, Nelson, Harding & Acklie, Robert S. Stauffer, Robert E. Powell, and *Stern & Harris,* for appellants.

Jack Devoe and *James E. Ryan,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the Nebraska State Railway Commission, hereinafter referred to as the commission. Harold Johnson, who then held certain operating authority from the commission to haul petroleum products in intrastate commerce as a motor common carrier, did, on September 30, 1958, file an application with the commission seeking to acquire, by transfer, some of the operating rights then held by George Neuswanger as a motor common carrier, which rights are described as follows: "Petroleum products, irregular routes between Superior, on the one hand, and, on the other hand, points generally throughout Nebraska." George Neuswanger joined in the application. Attached to the application

is a contract entered into by the above parties, dated September 23, 1958, wherein Neuswanger agrees to sell to Johnson the foregoing operating rights and to fully cooperate in seeking to obtain a transfer thereof to him.

On the same day, and accompanying the application for transfer, Johnson filed an application with the commission seeking an extension of the authority sought to be acquired, provided the commission approved the transfer thereof to him. The extension he requested is as follows: "for the transportation of petroleum products from all producing, refining, distributing and loading points within the State of Nebraska to points generally throughout Nebraska."

Thereafter, on November 11, 1958, the commission entered an order citing the applicant in Application No. M-2142, George Neuswanger of Alliance, Nebraska, to appear and show cause, if any there be, why an order should not be entered suspending, changing, or revoking in whole or in part the certificate of public convenience and necessity which had been issued to him, which charge and certificate will be more fully set out hereinafter.

A time and place was set by the commission for hearing these matters and notice was given thereof to all parties interested therein. In response to such notice eight holders of operating authority from the commission to haul petroleum products in intrastate commerce in Nebraska as motor common carriers, most of which authority is on a general or statewide basis, intervened in support of the order to show cause. They also filed protests contending, for various reasons therein set forth, which are sufficient to raise the issues hereinafter discussed, that the commission should not grant Harold Johnson his requests. These objectors are Basin Truck Company, Denver, Colorado; Preisendorf Transport, Inc., Grand Island, Nebraska; Ruan Transport Corporation; R. B. "Dick" Wilson, Inc., of Nebraska; Wheeler Trans-

port Service, Inc.; Melton Transport Company of Nebraska; Earl Houk, doing business as Western Nebraska Transport Service, Scottsbluff, Nebraska; and Herman Bros., Inc., of Omaha, Nebraska.

A consolidated hearing was had on these matters before an examiner on January 6, 1959. The examiner thereafter, on January 21, 1959, filed a report with the commission, dated January 19, 1959, wherein he recommended that the order to show cause that was issued by the commission against George Neuswanger should be vacated; that the transfer requested by Johnson should be approved; and that the authority so transferred should be extended in the manner requested. All eight of the protesting carriers filed exceptions to the examiner's report and to his recommendations therein contained. These exceptions the commission overruled. The commission then found the order to show cause, which it had previously issued against George Neuswanger, should be vacated and so ordered; it found that Harold Johnson should be authorized to acquire the operating rights held by George Neuswanger, which have been hereinbefore set forth, since the transfer thereof to Johnson would be consistent with the public interest and would not unduly restrict competition, and it ordered such operating rights transferred to Johnson to be consolidated with the authority he already held, cancelling his old certificate and ordering a new certificate to be issued covering such consolidated authority. The commission also found that the present and future public convenience and necessity require the extension of the authority sought to be transferred to the extent requested, and that doing so would not result in any new or different service or operation as to the territorial scope than that which is or may be rendered or engaged in by the respective parties under their present authority. Based on such findings it ordered such extended authority to be included in the new certificate which it ordered to be issued to Johnson. All eight protesting

carriers filed motions for rehearing and reconsideration. This appeal was taken by them from the overruling thereof.

For convenience we shall herein refer to Harold Johnson as either Johnson or appellee; to George Neuswanger as Neuswanger; and to the eight motor common carriers who intervened and protested as either appellants or protesting carriers.

Appellee contends that in certain respects the appellants' assignments of error do not meet the requirements of our Revised Rules. Applicable to this contention is the following: "Under section 25-1919, R. R. S. 1943, and Revised Rules of the Supreme Court, Rule 8a2(4), consideration of the cause on appeal is limited to errors assigned and discussed, except that the court may, at its option, note a plain error not assigned." Zych v. Zych, 165 Neb. 586, 86 N. W. 2d 611. We have examined appellants' briefs in this respect and find the contention made to be without merit.

In view of Johnson's status as a holder of authority to operate as a motor common carrier in intrastate commerce in Nebraska, section 75-240, R. R. S. 1943, has application to these proceedings. As stated in Burlington Truck Lines, Inc. v. Brown Transfer, *ante* p. 331, 102 N. W. 2d 450: "An application to the Nebraska State Railway Commission for the transfer of valid intrastate operating rights from one common carrier to another is properly instituted under section 75-240, R. R. S. 1943."

There are three phases of this proceeding, each of which requires separate consideration. However, in view of the contentions made by the parties in regard thereto, it would be well to set out some general principles which are applicable to appeals from the commission.

"The power of the Nebraska State Railway Commission to regulate common carriers is derived from Article IV, section 20, of the Constitution. Such powers are

plenary and self-executing in the absence of specific legislation on the subject.

"Where the Legislature enacts specific legislation implementing Article IV, section 20, of the Constitution, the Nebraska State Railway Commission is subject to and governed by the provisions of such enactment." In re Application of Richling, 154 Neb. 108, 47 N. W. 2d 413. See, also, R. B. "Dick" Wilson, Inc. v. Hargleroad, 165 Neb. 468, 86 N. W. 2d 177; In re Application of Neylon, 151 Neb. 587, 38 N. W. 2d 552; Moritz v. Nebraska State Railway Commission, 147 Neb. 400, 23 N. W. 2d 545; In re Application of Hergott, 145 Neb. 100, 15 N. W. 2d 418.

"The railway commission is clothed with legislative, administrative and judicial powers, and * * * this court has jurisdiction to review the orders and regulations of the commission on appeal." Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N. W. 234.

"On an appeal to the Supreme Court from an order of the Nebraska State Railway Commission administrative or legislative in nature, the only questions to be determined are whether the Nebraska State Railway Commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." In re Application of Neylon, *supra*. As stated in Furstenberg v. Omaha & C. B. St. Ry. Co., 132 Neb. 562, 272 N. W. 756: "Where the action of the railway commission is not unreasonable or arbitrary and does not exceed its powers or violate a rule of law, this court will not interfere with its findings of fact for the reason that they involve administrative and legislative rather than judicial questions." And, in Caudill v. Lysinger, 161 Neb. 235, 72 N. W. 2d 684, we said: "The question of whether or not action is unreasonable and arbitrary is of course one of fact." See, also, Preisendorf Transp., Inc. v. Herman Bros., Inc., 169 Neb. 693, 100 N. W. 2d 865.

On November 11, 1958, the commission ordered Neus-

wanger "* * * to appear before an Examiner of the Commission in the Commission Hearing Room, Capitol Building, Lincoln, Nebraska at 9:30 a. m. on Tuesday, January 6, 1959, to show cause, if any there be, why said certificate of public convenience and necessity * * * should not be suspended, changed or revoked for willful failure to comply with the provisions of Sections 75-222 to 75-250, R. R. S. 1943, as amended, with the lawful orders, rules, and regulations of said certificate including the specific counts more fully set forth in Appendix B hereto, * * *." Appendix "B" is as follows: "Specific Counts: 1. Cessation of operations and discontinuance of service contrary to General Order 81, section (9)(a)."

Provisions of section (9)(a) of General Order 81 are as follows: "(9) Failure of carriers to obtain Commission approval to: (a) Discontinue, either in whole or in part, service authorized under a certificate or permit."

Section 75-238, R. R. S. 1943, provides, in this respect, as follows: "Permits and certificates shall be effective from the dates specified therein, and shall remain in effect until terminated as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the State Railway Commission, be revoked or may, upon complaint or on the commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part, for willful failure to comply with any of the provisions of sections 75-222 to 75-250, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate."

We said in In re Application of Resler, 154 Neb. 624, 48 N. W. 2d 718, that: "'* * * should the commission, after hearing, revoke, change or suspend the certificate, it must do so for willful failure to comply with the provisions of the act or with any lawful rule or regulation

of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate.' " And in Union Transfer Co. v. Bee Line Motor Freight, 150 Neb. 280, 34 N. W. 2d 363, it was said: "The term 'willful failure,' as used in section 75-238, R. S. 1943, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of."

Neuswanger, doing business as Nebraska Transport Company, was originally granted a certificate of public convenience and necessity by the commission on April 5, 1938, such certificate being granted to him pursuant to his application designated by the commission as No. M-2142. This authority was clarified by the commission as of February 15, 1949, and its certificate issued to Neuswanger as of that date describes his operating rights as follows: "Commodities generally, except those requiring special equipment. ROUTE OR TERRITORY AUTHORIZED: Irregular routes between points in counties of Box Butte, Morrill, Scotts Bluff, Dawes, Sioux and Sheridan, on the one hand, and, on the other hand, Omaha, Lincoln, Superior and points generally throughout the state. SERVICE AND ROUTE OR TERRITORY AUTHORIZED: Petroleum products between Superior, on the one hand, and, on the other hand, points generally throughout the state of Nebraska." It is the latter part of this authority that is here involved.

The authority here sought to be acquired by Johnson from Neuswanger was leased by Neuswanger, with the commission's approval, to Fred Worm of Ord, Nebraska, doing business as Worm Transport Company, from February 10, 1949, to April 1, 1955. Just what operations Worm conducted thereunder the record does not show. Although Neuswanger said he solicited business during the period from April 1, 1955, to February 1, 1957, there is no evidence to show that any operations were carried on under this authority during that period.

Beginning with February 1957, Neuswanger entered into a lease agreement, approved by the commission, with H. H. Edwards of North Platte. The equipment leased by Neuswanger from Edwards consisted of a truck-tractor and trailer. During the period from February 1957 through September 1958, the evidence shows this unit, which was driven by Edwards, was used to haul 140 loads of petroleum products from the Champlin Oil Company's refinery at Superior, Nebraska, to points in Nebraska as follows: 134 loads to Larson Service at Gothenburg; 2 loads to City Oil Co. at Harvard; 2 loads to Porter Oil Co. at Sidney; 1 load to Mayers' Service at North Platte; and 1 load to Sears Service at Auburn. Edwards solicited and obtained all of this business except the 2 loads delivered to Sidney, which orders were obtained by Neuswanger. This operation continued and was in effect at the time of the hearing although no evidence was introduced to show the extent thereof during the months of October, November, and December of 1958, and up to January 6, 1959, the date of hearing. Under this situation we cannot say the commission was wrong in vacating its order to show cause for the evidence adduced fails to show that Neuswanger willfully ceased or discontinued to offer his services to those who desired them and, if they did, that he failed to perform the services requested insofar as his operating authority permitted. Consequently there was no need to obtain the commission's approval to discontinue such service either in whole or in part and Neuswanger was therefore not guilty of violating section (9)(a) of the commission's General Order 81. There was also no evidence adduced to show any willful failure on the part of Neuswanger to observe and comply with the provisions of sections 75-222 to 75-250, R. R. S. 1943, or with the terms, conditions, or limitations of his certificate, or with the lawful orders, rules, and regulations of the commission promulgated under the foregoing statutes. In view thereof we can only

come to the conclusion that the commission was right in vacating its order to show cause. See, Caudill v. Lysinger, *supra;* Houk v. Peake, 162 Neb. 717, 77 N. W. 2d 310.

The second question involved is, was the authority Johnson sought to acquire dormant? If it was then the following provision of section 75-240, R. R. S. 1943, would have application: "Provided, that if any of the certificates or permits proposed to be merged or consolidated are dormant, the commission may approve an application for consolidation or merger only upon proof of and a finding that such merger or consolidation is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-230; * * *." See, also, Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N. W. 2d 386; Caudill v. Lysinger, *supra.* Under this proviso, if the authority appellee sought to acquire was dormant, the burden was on him to show that the transfer would be required by the present and future public convenience and necessity. See, Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra;* Schmunk v. West Nebraska Express, *supra;* In re Application of Canada, 154 Neb. 256, 47 N. W. 2d 507.

We think the question of dormancy, in case where an application is made for transfer of operating rights, should be the same as where an order to show cause has been issued based upon that ground. In Caudill v. Lysinger, *supra,* we said: "It is conceded that there was no cancellation and revocation of the certificate in February 1952. Even if there had been evidence of an order finding dormancy on February 1, 1952, it would still be necessary to say that dormancy did not exist at the time the order to show cause was issued and at the time of the hearing." Applying the foregoing here we find the operating rights sought to be acquired by Johnson were not dormant at the time he made application to the commission for the transfer thereof.

In this situation the following language of section 75-240, R. R. S. 1943, applies: "If, after such hearing, the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing and able to properly perform the proposed service, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract or acquisition of control of the properties, or any part thereof, certificates or permits of the whole, or any part thereof, upon such terms and conditions as it shall find to be just and reasonable; * * *."

We said in Caudill v. Lysinger, *supra:* "* * * where a certificate is not dormant it may be transferred on approval of the commission under reasonable rules and regulations to be prescribed by it, (1) if the transfer will be consistent with public interest, (2) if it will not unduly restrict competition, and (3) if the transferee is fit, willing, and able to perform the service proposed. § 75-240.02, R. S. Supp., 1953." While the above quotation refers to section 75-240.02, R. R. S. 1943, which controls when the party seeking the transfer is not a motor common carrier, the provisions of section 75-240, R. R. S. 1943, are in this respect the same.

There is no question but that Johnson is fit, willing, and able to perform all services that the public may require under the operating authority he seeks to acquire and consolidate with that which he already has. In fact, the record shows he will undoubtedly furnish better service than that which Neuswanger and his lessee have, in the past, performed thereunder. Under this situation we cannot say that the commission's findings that the proposed transfer will be consistent with the public interest and will not unduly restrict competition were unreasonable or arbitrary. In fact, it would seem to be a desirable transfer from the public's point of view.

The third phase of the litigation raises the question, will the proposed extension of the operating rights

transferred from Neuswanger to Johnson, when consolidated in Johnson with the operating rights he already holds, result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the respective parties under the authority as it existed prior thereto and, if so, did appellee establish that such extended rights will be required by the present and future public convenience and necessity?

Section 75-240, R. R. S. 1943, provides, in this respect, as follows: "* * * and provided further, that if the proposed merger or consolidation of the certificates or permits will permit or result in a new or different service or operation as to territorial scope than that which is or may be rendered or engaged in by the respective parties, * * * the commission may approve such an application for merger or consolidation only upon the basis of proof of and a finding that the proposed merger or consolidation is or will be required by the present and future public convenience and necessity, in the same manner as provided in section 75-230."

The commission found that the transfer will not result in a new or different service or operation as to the territorial scope than that which is or may be rendered or engaged in by the respective parties under the authority as it existed in the parties prior to the transfer. That such a finding is wrong, and therefore unreasonable and arbitrary, is made self evident by reading the certificates of public convenience and necessity held by Neuswanger and Johnson prior to the transfer of a part of Neuswanger's rights to Johnson, and the extension of the authority so transferred. The rights held by Neuswanger at the time the application to transfer was made have already been set forth herein. Those then held by Johnson were as follows:

"A. SERVICE AUTHORIZED: Petroleum and petroleum products, except crude oil and anhydrous ammonia; in bulk in tank vehicles.

"ROUTE OR TERRITORY AUTHORIZED: From all producing, refining, distributing and loading points within the State of Nebraska as points of origin, to O'Neill, Atkinson, Stuart, Bassett, Springview, Long Pine, Ainsworth, Johnstown, Cody, Merriman, Gordon, Hay Springs, Chadron and Valentine, as points of destination, with return of rejected shipments authorized, over irregular routes.

"B. SERVICE AUTHORIZED: Liquified petroleum gas in bulk in tank vehicles.

"ROUTE OR TERRITORY AUTHORIZED: From all producing, refining, distributing and loading points within the State of Nebraska as points of origin to points and places in Nebraska on and West of U. S. 183, as points of destination, with return of rejected shipments authorized.

"C. SERVICE AUTHORIZED: Liquid petroleum products in bulk in tank trucks.

"ROUTE OR TERRITORY AUTHORIZED: From all refining and distributing points in Nebraska, as points of origin, to Springview, Valentine, and Crookston, as points of destination, with return movement of rejected shipments only, over irregular routes."

The extension would permit Johnson to engage in statewide transportation of petroleum products as a motor common carrier as to both points of origin and destination, operating rights which neither Johnson nor Neuswanger held. That Johnson so understood his application is made clear by his testimony, for he testified if the extended rights were granted he intended to start service on a statewide basis.

We come then to the question, did appellee establish that the extended service will be required by the present and future public convenience and necessity, such burden being on him? See Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra*. Before discussing this question it is well to restate some principles governing the commission's regulation of services in the field of

intrastate commence, as set forth in our opinions. In Furstenberg v. Omaha & C. B. St. Ry. Co., *supra,* we said: "Justice Brandeis, in speaking of the necessity for regulation of public utilities or business affected with the public interest and certificates of convenience and necessity therefor, expressed the modern view in a dissenting opinion in New State Ice Co. v. Liebmann, 285 U. S. 262, when he said: 'The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service. There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied.' As to common carriers, this is the very foundation and the only reason ever given for the requirement of certificates of convenience and necessity." And in Publix Cars, Inc. v. Yellow Cab & Baggage Co., *supra,* this court said: "It must be borne in mind that it is not the policy of the law in the regulation and control of public utilities to promote competition between common carriers as a means of providing service to the public. The policy is that through regulation of an established carrier or carriers occupying a given field and protecting it from competition it may be able to serve the public more efficiently and at a more reasonable rate than would be the case if other competing businesses were authorized to serve the public in the

same territory. * * * The rule undoubtedly is that existing carriers shall receive a fair measure of protection against ruinous competition. * * * Under this theory, certificates of convenience and necessity should be granted, if any are to be granted, to existing carriers if they are able to show their ability to furnish the required service to the public, on the theory that existing investments should first be protected, everything else being substantially equal." See, also, In re Application of Canada, *supra.*

Out of these principles has come a yardstick by which we have measured this question in cases where new or extended operating rights are sought. It is as follows: "In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified operation without endangering or impairing the operations of existing carriers contrary to the public interest." In re Application of Moritz, 153 Neb. 206, 43 N. W. 2d 603. See, also, Preisendorf Transp., Inc. v. Herman Bros., Inc., *supra;* Houk v. Peake, *supra;* Schmunk v. West Nebraska Express, *supra.*

The evidence shows appellants are all motor common carriers of petroleum products actively operating in Nebraska in intrastate commerce under authority, most of which is on a statewide basis, issued to each of them by the commission; that they actively solicit business in various ways over the entire state and can handle more business than they now have with the equipment and terminal facilities they presently possess agreeing, however, to get additional equipment if there is need for them to do so; that the extension would authorize new and competitive services in the same field in which they are now operating for which services no real need has been shown; that such new services would

take from these protesting carriers some of the traffic which they now have; that the services now rendered by these protesting carriers in this field are adequate and satisfactory; that there is no present need for additional services therein; and that the protesting carriers will provide such additional equipment as is needed to provide all the services the public needs in this field.

Under the evidence adduced we do not think there is any real need for the additional services which could be rendered under the extension authorized. We think these services can and will be satisfactorily performed by carriers already in the field. To permit these additional services in this same field of transportation would endanger or impair the operations of carriers already in that field. We hold, under the situation here presented, that the commission's finding that the present and future public convenience and necessity requires an extension of the authority transferred is both unreasonable and arbitrary and cannot be sustained.

Appellee, in his application, states: "That the source of supply of petroleum products shifts from time to time and because of this condition it has been the practice and policy of this Commission in recent years to grant petroleum carriers authority to serve from all producing, refining, distributing and loading points within the state as points of origin." He cites Houk v. Peake, *supra,* and Johnson v. Peake, 163 Neb. 18, 77 N. W. 2d 670. It is true that in each of those cases we approved the extension of the operating rights to cover sources of origin of the product being transported, but the factual situation therein, as to points of destination, was not the same as herein and each case must stand or fall on its own factual situation. We also call attention to the fact that in Houk v. Peake, *supra,* we said: "Herein, applicant's existing destination area has not been enlarged and it is territory which has been theretofore satisfactorily served by applicant in a field not occupied by or adequately and satisfactorily served by protestants.

A small portion of such territory has been served at times few in number by two protestants who never have actually occupied applicant's field of destination but would do so if future business then made it necessary and profitable." And, in Johnson v. Peake, *supra*, we said: "Without question there are among the protesting carriers those who have intrastate authority to serve the area involved. Some of them are presently serving customers in the area involved. The larger of these carriers, from the standpoint of business handled and equipment available, do not maintain terminals nor equipment in the area involved. Two of them offered evidence that they were ready, willing, and able to establish terminals and maintain equipment in the area involved and to render the newly required service. They, however, obviously were not ready or willing to do so until it appeared to be economically feasible. The evidence is ample to sustain the commission's finding that existing authorized intrastate carriers have been unwilling and have failed to furnish the adequate and satisfactory service in the area that the business requires." It thus becomes evident that the factual situation in these two cases presented an entirely different picture as to what service the motor common carriers in the field had been rendering or under what condition they were willing to render additional service. We do not think the holdings in these cases are controlling here.

We have come to the conclusion that the order of the commission vacating its order to show cause, which it had caused to be issued against Neuswanger, should be affirmed; that its order granting the application of Johnson to have transferred to him certain of the operating rights held by Neuswanger, which Neuswanger had agreed to sell to Johnson, and have the same consolidated with operating rights already held by Johnson should be affirmed; but that the order of the commission extending the operating rights so transferred to and consolidated in Johnson's certificate of public con-

venience and necessity should be vacated and set aside. It is so ordered. All costs are taxed to appellee.

AFFIRMED IN PART, AND IN PART REVERSED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT CLYDE SEATON ET AL., APPELLANTS.
103 N. W. 2d 833

Filed July 1, 1960. No. 34738.

1. **Recognizances.** In a criminal case where a recognizance has been forfeited such forfeiture may be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
2. **Bail.** The authority of the district court to remit a part or all of the penalty of a bail bond is a sound discretion to be exercised not arbitrarily or capriciously but with regard to what is right and equitable under the circumstances and the law, directed by reason and conscience to a just result.
3. ———. Excessive bail is prohibited by the Constitutions of the United States and of the State of Nebraska.
4. **Appeal and Error.** In appeals in equity from the district court to the Supreme Court, wherein a review of facts is required, it is the duty of the Supreme Court to try the issues of fact de novo and reach an independent conclusion as to what findings are required without reference to the conclusion reached in the district court.
5. **Bail: Appeal and Error.** A proceeding the purpose of which is to seek a remission of forfeiture of bail bond is equitable in character and on appeal to the Supreme Court, if an issue of fact is involved, is to be tried de novo and an independent conclusion reached.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Reversed and remanded with directions.*

Joseph M. Lovely and *Webb, Kelley, Green & Byam,* for appellants.

Clarence S. Beck, Attorney General, and *Richard H. Williams,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

The action out of which the present proceeding flows was a criminal action in which Robert Clyde Seaton was charged by information with the offense of murder in the second degree. The date of the alleged offense was March 27, 1954. The information was filed April 2, 1954. Seaton was arraigned on April 5, 1954, and pleaded not guilty. On that date bail was fixed in the amount of $7,500. On May 20, 1954, Summit Fidelity & Surety Co. of Akron, Ohio, entered into a recognizance in the amount of $7,500 by the terms of which Seaton was required to personally appear in the district court for Douglas County, Nebraska, from day to day, and from term to term, until final judgment, or as directed by the court, until finally discharged, to answer the charge of second degree murder. On the basis of this recognizance Seaton was released from custody.

According to the bill of exceptions trial was set in the case for April 11, 1955. On this date the attorney for Seaton made an application for a continuance which was denied. The bill of exceptions by an exhibit containing a copy of the minutes of the trial judge discloses that on that date the recognizance was forfeited for the reason that Seaton was a fugitive from justice and that he had not appeared in accord with the requirements of the recognizance.

The transcript and the bill of exceptions both disclose that on May 31, 1955, the Summit Fidelity & Surety Co. surrendered Seaton in open court and into the custody of the sheriff. Thereafter Seaton remained in custody of the sheriff until the final disposition of the case.

The case was not tried until October 17, 1955. The trial continued to October 20, 1955. The jury was unable to agree on a verdict. It was accordingly discharged.

The case was again tried. This trial started January

30, 1956. A verdict was returned on February 2, 1956, by which Seaton was found guilty of manslaughter. It is a matter of no controlling significance here but he was sentenced to serve a term of 9 years in the Nebraska State Penitentiary.

On March 13, 1956, the county attorney filed a motion for judgment of default on the recognizance which was forfeited on April 11, 1955.

On March 27, 1956, the Summit Fidelity & Surety Co. filed a request that the court remit the full amount of the "bond" or bail or such part as may seem just and equitable as provided by law.

A trial was had on these motions and the court refused to remit any part of the bail and rendered judgment for the full amount of $7,500. From this judgment Summit Fidelity & Surety Co. has perfected an appeal.

The motion of the county attorney, who will be referred to hereinafter as the appellee, and the request of the Summit Fidelity & Surety Co., which will be hereinafter referred to as the appellant, present the only matters for consideration. The only matter for determination, in the light of the assignments of error, is that of whether or not the court erred in refusing to remit in whole or in part the liability on the recognizance.

The procedure followed by the appellee is in accordance with the provisions of statute. See § 29-1108, R. R. S. 1943. Likewise the procedure followed by the appellant in its effort to obtain a remission of the bail complies with statutory provisions. See §§ 29-1107 and 29-1109, R. R. S. 1943.

Section 29-1107, R. R. S. 1943, contains a general characterization of what should be controlling in the determination of the question of whether or not a forfeiture should be enforced. It is in its nature equitable or, in other words, it requires an equitable approach and determination. Specifically it requires that the action shall be measured in the light of the requirements of justice. The section is as follows: "The court may direct that

a forfeiture of the recognizance be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture."

In application of this provision this court in State v. Konvalin, 165 Neb. 499, 86 N. W. 2d 361, said: "The authority given to the district court to remit a part or all of the penalty of a bail bond is a sound discretion to be exercised not arbitrarily or capriciously but with regard as to what is right and equitable under the circumstances and the law, directed by reason and conscience to a just result." See, also, State ex rel. Smith v. Western Surety Co., 154 Neb. 895, 50 N. W. 2d 100; State v. Honey, 165 Neb. 494, 86 N. W. 2d 187.

The duty of the district court was to ascertain what burden, within the limits of the recognizance, in the light of law, fact, reason, and conscience should be imposed upon the appellant.

Under law there was the duty to render a forfeiture but the law specifically permits remission in whole or in part.

Under the facts there is nothing to disclose any expense incurred by the State except that of the issuance of subpoenas, or any particular inconvenience as a consequence of what occurred which added any financial burden.

In arriving at a determination of what was reasonable the surrounding circumstances and the attitude toward and the purposes of bail of course must be considered. It may well be said that throughout our federal and state history bail has been provided for and favored if not even encouraged. The Eighth Amendment to the Constitution of the United States is as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Article I, section 9, of the Constitution of Nebraska, provides: "All persons shall be bailable by sufficient sureties, except for treason and murder, where the

proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The primary obligation exacted of a surety on a recognizance is not in the nature of a penalty or forfeiture, but it is an obligation to produce the party released from custody. It is only in case of failure that forfeiture is contemplated. It does not appear reasonable to say that the maximum of the recognizance should be exacted where the surety in good faith has complied with the duty to produce, although belatedly, without any indication that there has been any ultimate interference with or abridgment of the ends of justice. From the language of the statute allowing remission this appears to represent the intention of the Legislature in the enactment of the provision.

This is the attitude expressed by this court toward the present statute and an antecedent statute of like character. The case of State v. Mullally, 98 Neb. 162, 152 N. W. 326, was one where the charge was grand larceny and the recognizance was in the amount of $1,000. The defendant was produced after forfeiture of the recognizance. There was a remission of all except $250. The amount was based upon the expense to which the State and county were put. This court stated that this was not an abuse of discretion.

The case of State v. Konvalin, *supra,* was one wherein the charge was burglary in one count and in another that he was a habitual criminal, and the recognizance was for $3,000. He was after forfeiture surrendered in court. There was a remission of all except $900. This court said with reference thereto: "The essence of the decision of the district court is that it acted as it did in the exercise of allowable discretion guided by appropriate standards."

As a proper definition of discretion required under the statute and which was exercised by the district court this court quoted the following from Styria v.

Morgan, 186 U. S. 1, 22 S. Ct. 731, 46 L. Ed. 1027: " 'The term discretion implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action.' " By quotation from Langnes v. Green, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, it was said: " 'When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.' "

The determination that the remissions in the two cases cited herein were reasonable and represented a sound exercise of judicial discretion cannot be harmonized with the failure to remit any part of the $7,500 or the total of the obligation of the recognizance in the present instance.

This court has said that what was said and done in the two cited cases represented the exercise of a sound judicial discretion. The effect of those pronouncements therefore is to declare that the failure to remit in the present instance was unreasonable and arbitrary. This must be true since nothing is apparent that in reason and good conscience would or could in justice sustain a forfeiture to any great degree in excess of that exacted in State v. Konvalin, *supra*. Accordingly it is held here that the judgment in this respect was erroneous.

In the light of this the question is presented as to what shall be the further disposition of the matter of remission.

In State v. Konvalin, *supra*, it was said with reference to the statute involved here: "The discretion implicit in the statute is bestowed upon and is to be exercised by the district court. This court should not substitute its discretion for that of the district court." In the light of this, is this court required to remand the

matter for further consideration by the district court, or should the amount of revision be determined here?

In the first place, the second sentence of the quotation is obiter dictum since, as is clear, the function of this court was complete when the exercise of discretion by the district court in that case was approved. The question of what should have been done in case of disapproval of discretion was not here for determination.

In the second place, section 25-1925, R. R. S. 1943, as follows, requires that this court shall try the matter de novo and make a decision in all respects independently of the finding and judgment of the district court: "In all appeals from the district court to the Supreme Court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the Supreme Court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such question or questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

It is true that the inquiry is with regard to a statutory matter related to a criminal prosecution, a law action. It however is also true that the subject matter involved in this appeal is by declaration of statute an equitable matter to be decided on the basis of equitable principles and considerations. Even in law actions this court is not barred from the entry of judgment on reversal.

In the early case of Porter v. Sherman County Banking Co., 40 Neb. 274, 58 N. W. 721, it was said: "Except where the decision of an appellate tribunal necessitates a trial of an issue for which the constitution guaranties a trial by jury, it rests in the discretion of the appellate tribunal, upon the reversal of a judgment, to enter in

the appellate court a proper judgment or to remand the case to the court from which it was appealed, either with directions to enter a specific judgment, for a retrial of particular issues, or for a new trial of the whole case. * * *." This pronouncement was approved in Netusil v. Novak, 120 Neb. 751, 235 N. W. 335.

The proceeding here is in its nature equitable within the meaning of the statute and accordingly the trial here is de novo. See, Baum v. McBride, 152 Neb. 152, 40 N. W. 2d 649; Musil v. Beranek, 160 Neb. 269, 69 N. W. 2d 885; Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N. W. 2d 19. In this light it is the duty of this court, without regard to what was done by the district court, to independently adjudicate the question of remission and the amount thereof.

In this view, the judgment of the district court is reversed, the amount of remission is fixed at all of the face amount of the $7,500 recognizance, except $1,000, and the cause is remanded with directions to the district court to render judgment accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

PREFERRED PICTURES CORP., APPELLEE, V. JOHN D. THOMPSON, DOING BUSINESS AS CHURCH FILM SERVICE, APPELLANT.
104 N. W. 2d 57

Filed July 1, 1960. No. 34741.

1. Witnesses. A party to an action is not an incompetent witness by whom to prove a transaction or conversation had with an agent of the other party thereto since deceased.
2. Courts: Appeal and Error. The efficacy of a correct decision by a court is not diminished or destroyed by the assignment or adoption by the court of an erroneous reason for it.
3. Fraud: Pleading. Fraud or misrepresentation is generally a question of fact and to be sufficient as a cause of action or a defense must be pleaded by suitable allegations of fact from which it may be concluded.

4. ———: ———. A general charge of fraud or misrepresentation is a conclusion and presents no issue of fact.
5. **Contracts.** If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce it to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract.
6. ———. If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein.
7. **Appeal and Error.** It must generally be determined before an error justifies a reversal by this court that it was prejudicial to the rights of the party against whom it was made.

APPEAL from the district court for Douglas County: JAMES M. FITZGERALD, JUDGE. *Affirmed.*

Frost, Meyers & Farnham and *James E. Fellows*, for appellant.

Beber & Richards and *William B. Woodruff*, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Appellant and appellee executed and delivered a contract, in part printed and the remainder thereof written, on February 19, 1953, in which appellee was called "Producer" and appellant was designated "Dealer." It was recited therein that the producer was the owner of all film copyrights to "The Pilgrimage Play," herein referred to by its name or as the picture, and the dealer desired to lease from the producer 16 mm. prints of the picture for use within the confines of continental United States for nontheatrical exhibition upon the terms and conditions recited in the contract. The contract, following the recitations stated above, provided in substance: That in consideration of the mutual promises, covenants, and conditions afterwards stated, the parties to the contract agreed that the pro-

ducer leased to and licensed the dealer, and the dealer accepted the lease and license to rent, exhibit, and exploit for nontheatrical exhibitions in continental United States, two 16 mm. prints of "The Pilgrimage Play" for a period of 3 years from May 1, 1953; that for the lease and license the dealer agreed to pay the producer the sum of $50 per print per month for each month during the 3-year term of the contract payable on the first day of each month commencing on the first day of May 1953; that this agreement contained the entire understanding of the parties; and that the dealer has read this agreement, consented to and agreed to its terms, and acknowledged receipt of a duly executed copy.

The prints of the picture were delivered by appellee to appellant and he accepted and used them in his business known as and conducted in the name of Church Film Service. Appellant paid appellee the amount the contract required for each of the months of May 1953 and each month thereafter to and including the month of January 1954, the sum of $900. The unpaid balance according to the terms of the contract was $2,700. The term provided by the contract was 3 years commencing May 1, 1953, and it terminated April 30, 1956. This litigation was commenced June 27, 1956, by appellee to recover from appellant the claimed unpaid balance of $2,700. The result of the trial of the case was a verdict for appellee for the amount claimed on which a judgment was rendered the day the verdict was returned. A motion of appellant for a judgment notwithstanding the verdict or, in the alternative, for a new trial, was denied. This appeal contests the correctness of the denial of that motion.

Appellant denied the cause of action pleaded by appellee and alleged that the contract referred to in its petition was entered into on the basis of fraudulent representations by appellee and that appellant performed the contract but that appellee had breached it. The counterclaim, designated cross-petition, of appellant

stated that on or about February 19, 1953, he entered into a contract, a copy of which was attached to the petition of appellee; that the contract was entered into on the basis of "fraudulent misrepresentations" on the part of appellee; that the contract was after its execution breached by it; and that appellant had been thereby damaged in the sum of $2,650 which he asked to recover from appellee. The new matter asserted by appellant was denied by appellee.

The negotiations with appellant with reference to a contract between him and appellee which resulted in the execution and delivery of the contract, the basis of this litigation, were conducted for appellee entirely by its representative or agent, Rev. J. Hugh Weilepp, hereafter called Weilepp. He as a representative of appellee negotiated with appellant concerning it, agreed on the terms of it, and prepared and executed the contract for appellee. The contract was executed and delivered February 19, 1953, but it bears date of May 1, 1953, the date of the commencement of its term. There was paid by appellant to appellee on February 19, 1953, on account of and as part of the consideration for it the sum of $300. Appellant testified that immediately prior to signing the contract he and Weilepp discussed the proposed terms and provisions of the contract that was then the subject of negotiation in relation to the original contract made in 1950 between appellant and appellee by which the former leased a print of "The Pilgrimage Play." Appellant was then asked what was explained to him as a reason for the changeover from one form of contract to another. The objection thereto of appellee was that the agent Weilepp who solicited and negotiated the contract in suit with appellant was deceased; that appellant had a direct legal interest in the case; and that he was incompetent to testify to any conversation or transaction between him and the agent of appellee, now deceased, under the "Dead Man's Statutes." The trial court sustained the objection and excluded the testi-

mony by appellant of any conversation of the agent had before the written contract was executed and delivered.

Appellant argues that the reason for the ruling of the trial court excluding the testimony offered by appellant in this respect was incorrect and resulted in prejudice to him. The relevant part of the statute involved is that no person who has a direct legal interest in the result of litigation, when the adverse party is the representative of a deceased person, shall be permitted to testify to any conversation or transaction had between the deceased person and the witness. § 25-1202, R. R. S. 1943. Appellant was not incompetent to testify to a conversation had by him and Weilepp, the deceased agent, because appellee was not the representative of the deceased agent. A party to an action is not an incompetent witness by whom to prove a transaction or conversation with an agent of the other party since deceased. Stated differently: "Adverse party" as used in the statute does not include agents or officers of "adverse party." German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106; Jacob North & Co. v. Angelo, on rehearing, 75 Neb. 381, 110 N. W. 570; Walker v. Hale, 92 Neb. 829, 139 N. W. 658; Luikart v. Braasch, 130 Neb. 361, 265 N. W. 13; Guardian Trust Co. v. Meyer, 19 F. 2d 186. The district court adopted an erroneous reason for excluding the evidence of appellant. The error was unimportant unless it was prejudicial. The efficacy of a correct decision by a court is not diminished or destroyed by the assignment or adoption of an erroneous reason for it. This court is not limited to the reason by virtue of which a district court made a decision. Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122; Sopcich v. Tangeman, 153 Neb. 506, 45 N. W. 2d 478; A-1 Finance Co., Inc. v. Nelson, 165 Neb. 296, 85 N. W. 2d 687.

The purpose of the testimony excluded by the court as outlined above was, according to the declaration of appellant, to prove the fraudulent representations made

to him by the agent of appellee to the effect that the agent represented to appellant that he would be the exclusive distributor of the film in a specified area, to wit, from Denver to Chicago not including Kansas City; that appellee would conduct a national advertising program; and that inquiries originating in that area received by appellee regarding the showing of the film would be forwarded to appellant. Accepting that purpose for the testimony proposed by appellant and refused admission by the trial court, the ruling of the district court was correct because the testimony in question did not tend to support any adequately pleaded defense or cause of action by appellant based on fraud or fraudulent representations made to him by appellee. The only allegation in the answer of this nature was: "that the contract referred to in plaintiff's petition was entered into on the basis of fraudulent representations by plaintiff." The only allegation in the cross-petition of this nature was: "that said contract was entered into on the basis of fraudulent misrepresentations on the part of plaintiff." These were each a conclusion and represent no issuable fact.

In Thomas v. Markmann, 43 Neb. 823, 62 N. W. 206, is the following: "The answer which assailed the judgment did so in this language: 'That said judgment was procured by fraud, misrepresentation, and contrary to law.' This was a mere conclusion. The answer contained no averments of fact under which evidence was admissible to show that the judgment had been fraudulently procured."

In Johnston v. Spencer, 51 Neb. 198, 70 N. W. 982, this court said: "It is a rule of pleading that in pleading a charge of fraud and misrepresentation the facts must be stated, and not mere conclusions."

Chapman v. Meyers, 84 Neb. 368, 121 N. W. 245, quoted from the petition the following: " 'The said defendant had not at any time any interest in said certificates or any part thereof, and that the collection of the

said funds from the plaintiff herein on or about the 18th day of May, 1905 was done by misrepresentation, fraud, duress, and deceit on the part of said Ada Meyers,'" who was the defendant. The opinion then states that this constitutes the basis of plaintiff's action. The court then said: "It is a well-settled rule that in a charge of fraud and misrepresentation the facts showing such fraud must be pleaded, and a mere allegation of fraud or misrepresentation is not sufficient. * * * Tepoel v. Saunders County Nat. Bank, 24 Neb. 815; Aultman, Taylor & Co. v. Steinan, 8 Neb. 109; Arnold v. Baker, 6 Neb. 135; Clark v. Dayton, 6 Neb. 192. We think it may be said that this question is so well settled that it is unnecessary to cite any further authority in support of it. An examination of the petition in this case discloses that the only allegation relating to fraud contained therein is the one above quoted. That this is insufficient to state a cause of action based on fraud, misrepresentation, deceit, or duress seems clear. So we are of opinion that the petition in this case failed to state facts sufficient to constitute a cause of action."

In Nelson v. Nelson, 152 Neb. 741, 42 N. W. 2d 654, this court said: "Fraud is generally a question of fact and to be effective as a cause of action or a defense must be pleaded by suitable allegations of fact from which it may be concluded. * * * The mere charge of fraud is a conclusion and presents no issue." See, also, In re Estate of Nelson, 81 Neb. 363, 115 N. W. 1087; Weckerly v. Taylor, 74 Neb. 84, 103 N. W. 1065; Kemper, Hundley & McDonald Dry Goods Co. v. Renshaw & Co., 58 Neb. 513, 78 N. W. 1071.

This court has with commendable consistency since Arnold v. Baker, 6 Neb. 134, was decided in 1877 in no less than a score of decisions adhered to the doctrine that a general allegation of fraud or misrepresentation is a conclusion, presents no issue of fact, and that the facts of claimed fraud or misrepresentation must be specifically alleged to constitute a sufficient charge

thereof in a pleading. There was no issue of fraud or misrepresentation sufficiently pleaded in this case by appellant as a defense to the cause of action alleged by appellee or as a basis of a cause of action in the cross-petition interposed by appellant. It follows that any evidence of fraud or misrepresentation concerning the making of the contract, the basis of the cause of action of appellee, was inadmissible and it was properly excluded by the trial court.

Appellant had been for 16 years the owner and operator of the Church Film Service. It was an agency for the rental of religious films to churches. He made a contract with appellee in 1950 for the lease of and license to exhibit a film of "The Pilgrimage Play." That contract continued and appellant had the film by virtue thereof for 3 years until it expired in April of 1953. The term of the contract involved in this case commenced May 1, 1953. Appellant testified that before the contract was executed, its terms and provisions were discussed and the changes therein from the original contract he had with appellee were noted. It was explained to him and he knew that the new or second contract required him to pay appellee a fixed amount per month for each print of the picture during the term of the contract and that by it he was contracting for two prints instead of one print which he had under the original contract. These matters were discussed and he knew the facts while the new contract was being negotiated. He was furnished an executed copy of the contract when it was executed and delivered. He was, under the circumstances, bound to know that the new contract provided that it contained the entire understanding and agreement of the parties. The parties to it mutually operated under, performed the terms, and enjoyed the benefits of the new contract for 9 months immediately after its execution. Appellant had the prints and paid the monthly amounts required by the contract for a period of 9 months. The reason given

by appellant for failing to continue to perform the contract was that he was not getting enough business.

The written contract of the parties is complete and it is, under the circumstances, the only competent evidence of their agreement and obligations. Whatever was said by the parties concerning the making of the contract was a part of the negotiations concerning and relating to the subject matter of it and any oral statement of or understanding by the parties concerning it should have been, and to be effective was required to be, included in the written contract.

Gerdes v. Omaha Home for Boys, 166 Neb. 574, 89 N. W. 2d 849, states: "If negotiations between parties result in an agreement in reference to the subject matter thereof and if they reduce the agreement to writing, execute, and deliver it, the writing, in the absence of fraud, mistake, or ambiguity, is the only competent evidence of the contract. * * * If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. * * *."

The contract has not been challenged as ambiguous, the result of mistake, or adequately as the product of fraud. The written agreement is the only competent evidence thereof.

Appellee by motion asked the trial court to suppress a notice of appellant of the taking of a deposition of J. Ernest Bass because he was a nonresident of Nebraska, not a party to the case, and no process had been served upon him as required by law relating to the taking of depositions. This was April 22, 1959. The record does not show that any such notice or proof of service of it was presented to or was before the court at that time, or that any service of any notice had been made upon J. Ernest Bass or anyone representing him. The record contained at that time no information about him except it showed that he was not a party to the

case. It does not appear from the record that there was any objection to or contest of the order the motion to suppress asked, or any reason for taking the proposed deposition or that J. Ernest Bass had or was suspected of having any information of any matter material to any issue in the case. The district court sustained the motion the day it was filed. The trial of the case did not commence until more than a month and a half thereafter. There is an absence of any information that appellant made before the trial any further effort to secure any information or testimony from J. Ernest Bass. He appeared at the trial as a witness for appellee. He was examined by appellee in detail as a witness and he was extensively cross-examined by appellant in every way and upon every subject he desired. It developed on the trial that the entire negotiations with appellant for the contract in suit were conducted on behalf of appellee by Weilepp and that J. Ernest Bass had no part in them or any knowledge concerning them except what the contract shows. Appellant vigorously and extensively argues that he was prejudiced because he was deprived of the opportunity of taking the deposition of J. Ernest Bass in Omaha before the trial. There is not in the record the slightest indication that appellant was in any way or in any degree prejudiced in that regard. The record does not show that the order of the trial court suppressing the notice to take deposition was erroneous under the circumstances but in any event there was no prejudice to appellant caused by that order. It must generally be determined before an error justifies a reversal by this court that it was prejudicial to the rights of the party against whom it was made. Larsen v. Omaha Transit Co., 168 Neb. 205, 95 N. W. 2d 554.

There is no proof of the assertion of appellant in his answer and in his counterclaim that appellee breached the contract and that the prints were returned by ap-

pellant to appellee in satisfaction of any and all claims of the latter against the former.

The judgment should be and it is affirmed.

AFFIRMED.

HERMAN JUNGCLAUS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
104 N. W. 2d 327

Filed July 8, 1960. No. 34755.

1. **Indictments and Informations.** When a statute states the elements of a crime it is generally sufficient, in an information or indictment, to charge such crime in the language of the statute.
2. ———. When the charging of a crime in the language of the statute leaves the information or indictment insufficient to reasonably inform the defendant as to the nature of the crime charged, for the purpose of preparing his defense thereto, or to enable him to plead a judgment obtained thereon as a bar to a subsequent prosecution for the same offense, additional averments must be included to meet the requirements of due process.
3. ———. Where an information adequately informs the defendant as to the specific crime with which he is charged, it is not error for the trial court to deny a request for a bill of particulars.
4. **Criminal Law: Venue.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed.
5. **Criminal Law: Trial.** A conviction may rest on the uncorroborated testimony of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused.
6. ———: ———. Where a cautionary instruction on the weight and credibility of the testimony of an accomplice is requested, it is reversible error for the trial court to refuse to give such an instruction.

ERROR to the district court for Hall County: WILLIAM F. MANASIL, JUDGE. *Reversed and remanded.*

O'Sullivan & O'Sullivan and *Donald S. Bergquist, Jr.*, for plaintiff in error.

Clarence S. Beck, Attorney General, and *Gerald S. Vitamvas*, for defendant in error.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

The defendant was charged with second degree arson. Upon a trial of the case in the district court for Hall County the jury returned a verdict of guilty. The defendant has brought the case to this court for review.

The defendant first contends that the information is insufficient to charge a crime. The pertinent part of the information states: "that Herman Jungclaus, late of the County aforesaid, did, on or about the 9th day of May, A.D., 1959, in the County of Hall and the State of Nebraska aforesaid, then and there being did then and there unlawfully, wilfully, and maliciously set fire to and burn, or cause to be burned, a certain building situated in Doniphan, Nebraska, the property of Ivan Yates and Grace Ann Yates, in which there is a contractual interest running to Howard Jones, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska." The information was drawn under the provisions of section 28-504.02, R. R. S. 1943, which provides: "Any person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any building or structure of whatsoever class or character, whether the property of himself or of another, not included or described in section 28-504.01, shall be deemed guilty of arson in the second degree, * * *." No contention is made that the crime charged falls within the stated exception.

It is the rule in this state that due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as

a bar to any subsequent prosecution for the same offense. Cowan v. State, 140 Neb. 837, 2 N. W. 2d 111; Dutiel v. State, 135 Neb. 811, 284 N. W. 321. When a statute states the elements of a crime it is generally sufficient, in an information or indictment, to describe such crime in the language of the statute. Sedlacek v. State, 147 Neb. 834, 25 N. W. 2d 533, 169 A. L. R. 868. The information or indictment must, however, inform the accused with reasonable certainty of the charge being made against him in order that he may prepare his defense thereto and be sufficient to permit him to plead the judgment rendered thereon as a bar to a later prosecution for the same offense. If a charging of the offense in the language of the statute does not supply such information, the information or indictment will be insufficient, unless the preciseness of the charge is supplied by additional averments. State v. Coomes, *ante* p. 298, 102 N. W. 2d 454. The information in the present case states the time and place of the unlawful act, the nature of the act charged, that it was unlawfully, willfully, and maliciously committed, and the ownership and location of the building burned. It adequately informs the defendant of the precise charge against him and is sufficient to bar a second prosecution for the same offense. The trial court properly overruled the motion to quash the information and the demurrer subsequently filed thereto.

The defendant sought a bill of particulars for the purpose of apprising the defendant of the charge against him. The information adequately informed the defendant of the crime with which he was charged, and met all the requirements of due process. Under such circumstances it is not error for the trial court to deny the request of defendant for a bill of particulars. The plea in abatement, based on the failure of the court to require a bill of particulars, was properly overruled.

Defendant complains of the overruling of his motion for a change of venue. It is the contention of the de-

fendant that a fair and impartial trial could not be had in Hall County because of the bias, prejudice, and hostility of the citizens of the county inspired by the publicity given the case by newspaper, radio, and television accounts. The motion was supported by newspaper clippings, affidavits, and a large number of unsworn statements. An examination of the newspaper clippings reveals that they indicate no hostility or animosity toward the defendant. The purported facts were not discussed. They amount to nothing more than the conventional reporting of the progress of the case in the courts. The affidavits are to the effect that discussions and conversations with many persons indicate that defendant could not have a fair and impartial trial in Hall County because of bias, prejudice, and hostility created by newspaper, radio, and television reporting. We take notice of the fact that Hall County has a population in excess of 30,000 people. In any case of this character the pendency of the case and its progress through the courts constitutes news about which the public is bound to obtain some general knowledge. The crime charged is not one that by its nature creates a measure of hostility and animosity in the public mind. It seems unreasonable to believe that, in so populous a county, a fair and impartial jury could not be obtained.

The situation is analogous to that recited in Carlsen v. State, 127 Neb. 11, 254 N. W. 744, which supports the denial of the change of venue in the present case. In that case we said: "A motion for a change of venue is directed to the discretion of the trial judge, and unless an abuse thereof is disclosed by the record his ruling will not be reversed in the supreme court." See, also, Medley v. State, 156 Neb. 25, 54 N. W. 2d 233; Onstott v. State, 156 Neb. 55, 54 N. W. 2d 380. We find no evidence in the record indicating an abuse of discretion on the part of the trial judge in refusing a change of venue. The motion for a change of venue was properly overruled.

The defendant complains of the failure of the trial court to give defendant's requested instruction No. 34, a cautionary instruction regarding the weight and credibility to be given to the evidence of an accomplice. The defendant was charged with unlawfully setting fire to and burning a grocery store in Doniphan, Nebraska, on May 9, 1959. The State called Hubert Evers as a witness. He was employed in the grocery store at the time it burned and was a former employee of the defendant in a store in Grand Island. His testimony was to the effect that he and defendant, pursuant to a previously conceived plan to burn the building and contents, proceeded to the store at about 1:30 a.m. on the morning of the fire. He stated in effect that he stood by as a lookout while defendant engaged himself in setting fire to the store. The witness Evers was clearly an accomplice.

A person accused of crime may be convicted upon the testimony of an accomplice or accomplices, but a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all the other evidence in the case. A jury should be cautioned not to convict on such testimony alone, unless, after a careful examination of such testimony, it is satisfied, beyond a reasonable doubt, of its truth, and that it can safely rely on it. Lamb v. State, 40 Neb. 312, 58 N. W. 963; Ruzicka v. State, 137 Neb. 473, 289 N. W. 852; Garcia v. State, 159 Neb. 571, 68 N. W. 2d 151. It is the rule in this state that a defendant is entitled to a cautionary instruction on the weight and credibility to be given to the testimony of an accomplice, and the failure to give such an instruction upon request is reversible error. Neiden v. State, 120 Neb. 619, 234 N. W. 563; Cornell v. State, 138 Neb. 708, 294 N. W. 851. In the instant case such an instruction was requested and refused. We hold that where a cautionary instruction on the weight and credibility of the testimony of an accomplice is re-

quested, it is reversible error for the trial court to refuse to give it.

In view of the conclusion reached, other assignments of error not herein discussed do not require the consideration of this court. For the reasons stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

PARSONS CONSTRUCTION COMPANY, A CORPORATION, APPELLANT, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.
104 N. W. 2d 272

Filed July 8, 1960. No. 34756.

1. **Damages.** As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court.
2. ———. If the damages arising from a breach of the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages.
3. **Contracts.** Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful.
4. **Trial.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

APPEAL from the district court for Douglas County: CARROLL O. STAUFFER, JUDGE. *Affirmed.*

King & Haggart and *Mason, Knudsen, Dickeson & Berkheimer*, for appellant.

George C. Pardee, G. H. Seig, and *Harry H. Foulks, Jr.,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

This is an action at law brought in the district court for Douglas County by Parsons Construction Company, a corporation, as plaintiff, against the Metropolitan Utilities District of Omaha, a municipal corporation, defendant, to recover an amount withheld by the defendant under a contract entered into between the plaintiff and defendant which provided for a stipulated sum as liquidated damages for delayed completion of the construction of an extension to an existing filter building at the district's waterworks in Omaha. In addition, plaintiff sued for damages against the defendant claiming the defendant delayed completion of the contract by various acts and conduct on the part of the district's officers, agents, engineers, and employees acting in an arbitrary and unreasonable manner in violation of the said contract.

At the close of all of the evidence the plaintiff moved that the trial court determine that the damages provided for in the contract between the parties be declared a penalty, and that such provisions be declared void and unenforceable. The defendant moved that the trial court determine that such damages as set forth in the contract between the parties were liquidated damages and not a penalty. The trial court overruled the plaintiff's motion and sustained the defendant's motion.

The plaintiff moved the trial court to determine that defendant was in default in the performance of the contract as a matter of law, and that for this reason the defendant was prevented from enforcing the provisions for stipulated damages contained in the contract. The trial court overruled this motion.

The defendant moved the trial court to determine, as a

matter of law, that the evidence was insufficient to justify a verdict for the plaintiff on the allegations of its petition or to sustain a judgment if such verdict were rendered, and that the petition be dismissed. The trial court sustained this motion and dismissed the plaintiff's petition.

The plaintiff filed a motion for new trial. The trial court overruled the plaintiff's motion for new trial. The plaintiff perfected appeal to this court.

For convenience we will refer to the parties as designated in the district court or, as occasion requires, to Parsons Construction Company as Parsons; to the Metropolitan Utilities District as district or utilities district; to Earl G. Hawkins, Sr., president of Parsons Construction Company, as Hawkins, Sr.; to Earl G. Hawkins, Jr., superintendent of Parsons Construction Company, as Hawkins, Jr.; to the resident engineers under the contract between the Metropolitan Utilities District, a municipal corporation, and Burns & McDonnell Engineering Company, by their last names or as resident engineer or engineers; to the principal engineer for Burns & McDonnell Engineering Company as Davis; to the general superintendent of the water operations for the Metropolitan Utilities District as Detweiler; and to all other witnesses by their last names or titles.

The record shows that the consumption of water in Omaha was such that the water system was unable to meet the demands, due to the growth of the city. This required expansion of production of water, that is, more processing and pumping capacity was needed. The district entered into a contract with Burns & McDonnell Engineering Company of Kansas City, Missouri, hereafter referred to as the engineering company, on May 27, 1954, to do resident engineering and inspection required in connection with the extension at its Florence waterworks. This contract provided in part that the engineering company make recommendations to the district, in writing, with respect to the need for resi-

dent engineering and inspection service to be furnished by them, subject to approval by the general manager of the district. The contract further provided that resident engineers furnished under the contract by the engineering company should at all times be and remain the employees of the engineering company, and under no circumstances be considered employees of the district.

The district gave notice that it would receive bids for the extension of its waterworks and open the same on September 10, 1954. This contract was designated contract No. C-114. The contract provided that the contractor was to begin work within 15 calendar days, to complete all work necessary to enable the commencement of installation under contract No. E-110 within 173 calendar days, and to complete the entire contract within 265 calendar days from and after the date of due notification by the district of its approval and execution of the contract. The amount to be paid Parsons for the project was $471,712.

Article FC-31 of contract No. C-114, provided: "LIQUIDATED DAMAGES: It is mutually understood and agreed by and between the parties to this contract, in the execution of the same, that time is of the essence of the contract. In the event the Contractor shall fail to complete any portion of the work to be performed under this contract by and at the completion time bid in the Proposal, the Contractor shall pay unto the Utilities District as and for the liquidated damages, and not as a penalty, the sum of one hundred fifty dollars ($150.00) for each and every calendar day that the Contractor shall be in default; extensions of time granted by the Utilities District in accordance with the provisions of Article FC-19 shall not operate to the contrary, unless such extensions granted by the Utilities District specifically provide for the waiving of liquidated damages during and over such period of time extension.

"Liquidated damages will be waived for and during the extent of any delay which cannot be overcome by

reasonable acceleration of the approved work schedule, when such delay is caused by factors beyond the Contractor's control, provided that adequate evidence is presented by the Contractor to prove such delay and to enable the Utilities District to determine with exactness the extent and duration of such delay for each item of material and equipment involved.

"The Utilities District shall have the right to deduct said liquidated damages from any moneys in its hands, otherwise due, or to become due, to said Contractor, or to sue for and recover compensation for damages for non-performance of this Contract at the time stipulated herein and provided for."

There are certain established rules of law governing contracts such as contract No. C-114 in the instant case.

In the case of Stanford Motor Co. v. Westman, 151 Neb. 850, 39 N. W. 2d 841, this court held: "As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court." The court cited 15 Am. Jur., Damages, § 246, p. 678, as follows: "In such cases the court must find out whether the payment stipulated is in truth liquidated damages or a penalty. The question whether it is the one or the other is a question of law and one quite independent of the agreement of the parties to call it the one or the other." The court further said: "We said in Gustin & Co. v. Nebraska Building & Investment Co., 110 Neb. 241, 193 N. W. 269: '* * * where the damages are uncertain, and not readily capable of exact ascertainment by any known rule, and the parties surveyed the whole situation at the time of contract, and agreed upon the amount of damages, in case of a breach in the contract to construct a building by a certain time, such sum, in case of a breach, is the true measure of recovery and is liquidated damages and not a penalty.'" The court further held: "If the damages arising from a breach of

the contract are difficult of ascertainment or admeasurement, and if the stipulated amount is not disproportionate to the amount of damages that may be reasonably anticipated from the breach, it will usually be regarded as a provision for liquidated damages." See, also, Sofio v. Glissmann, 156 Neb. 610, 57 N. W. 2d 176; Edgar v. Anthes, 109 Neb. 546, 191 N. W. 682.

As stated in George W. Condon Co. v. Loup River Public Power Dist., 135 Neb. 284, 281 N. W. 31: "It is obvious that plaintiffs' rights in the premises are necessarily measured by the terms of their contract, if its provisions were drawn with the instant situation in contemplation of the parties thereto. * * * These rules are express agreements of the parties, mirror their intentions in entering into this contract, and must be enforced."

As stated in Barkalow Bros. Co. v. English, 159 Neb. 407, 67 N. W. 2d 336: "It has long been the law of this state that if persons to a transaction have put their engagement in writing in such terms as import a legal obligation without uncertainty of the object or extent of the engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing, and any parol agreement is merged in the written contract and testimony of prior or contemporaneous conversations is incompetent. In Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N. W. 2d 132, it is said: 'In the absence of fraud, mistake, or ambiguity a written agreement is not only the best evidence but the only competent evidence as to what was the contract of the parties.' "

The plaintiff contends that the trial court erred in holding that the contract provision was for stipulated damages and not for a penalty; that the trial court erred in holding as a matter of law that the defendant was not in default in its performance of the contract, and was not prevented from enforcing the provision for stipulated damages; that the trial court erred in

holding that the evidence was insufficient to justify a verdict for the plaintiff on the allegations contained in its petition or to sustain a judgment for plaintiff if such a verdict were rendered, and in sustaining defendant's motion to dismiss the plaintiff's petition; that the trial court erred in refusing to admit competent evidence offered by the plaintiff at the trial; and that the decision of the trial court is contrary to the evidence and to law.

This record is voluminous and contains a great number of exhibits. We set forth a summary of the relevant and material evidence sufficient to determine whether or not the trial court committed error, as contended for by the plaintiff.

Davis testified that he was a civil engineer or project engineer in the employment of the engineering company. As a project engineer he organized projects for design, and had general supervision of the construction on the project for which he was responsible. He further testified that water projects were his specialty; that he became connected with the project of the district for the expansion of its filter plant and other parts of the district's water system in Omaha; that the district needed modern improvement to expand the low service and high service pumping capacity; and that there was need for a completely new chemical process, new sedimentation basins, and expansion of the filter system. He further testified that he supervised the preparation of the drawings and contract documents relating to contract No. C-114; that the legal sections therein, FC sections, were a product of years of development and growth in the engineering company; and that the company used a standard form of contract and modified it for the particular project. Davis further testified that the expansion of the filter plant was badly needed; that the demands for water in Omaha were going up every summer and the plant was overloaded; and that the engineering company could anticipate that during the next sum-

mer there would not be enough water filtered to supply the demand. The engineering company determined that the time specified for the contractor to complete the project was adequate. Davis further testified that when the engineering company did work for clients such as the district, it tried to determine with some reasonable precision what the damages or loss might be because of delay, because of the interest that would have to be paid on bonds, as such projects are ordinarily constructed with borrowed money, the price that it might be required to pay the resident engineer, or engineers, on the project and to make a reasonable estimate of overhead that the client might be required to pay. In addition, Davis testified that the plant expansion and improvements and the efficiency of the same should be taken into consideration, and what the project is to be used for; that it would be extremely difficult to place a dollar value on the loss of efficiency of the plant; that with an ineffective filter plant, the filters would have to be overloaded which would require a high grade of pretreatments and additional chemicals; that because of the manner in which filters are constructed hydraulically, only a certain amount of water goes through each filter bed, and when all the filters in service are operated at maximum capacity, there is no more; and that to operate the filters near peak capacity it is necessary to have a first-class job of pretreatment. In other words, the poorer the pretreatment the shorter runs there will be on the filter beds and the oftener they have to be taken out of service to backwash. There is expense involved each time a filter is backwashed. Davis further testified that the engineering company takes into account the expense that might result to the client through delay, and tempers the amount according to the size of the job or contract; that there are many factors that could enter into the determination of what liquidated damages might be; and that in this instance the filter building was needed early in June because of big de-

mands for water during the summer.

Hawkins, Sr., part owner of Parsons, examined the site and prepared the cost estimate that went into the bid. He testified that in 1937, Parsons built an addition to the same filter plant, and he knew what the difficulties were. He also was familiar with contracts such as contract No. C-114, and the manner in which the same were handled by the district. Parsons had a similar contract with the district for the construction of mixing basins in 1945, and for delay of completion of the work under that contract was required to pay liquidated damages. Hawkins, Jr., was in charge of this project. Otte was Parsons' superintendent on the job, working under the general supervision of Hawkins, Jr., from September 30, 1954, until April 20, 1955. Obert succeeded Otte as superintendent on the job until the contract was completed. He, like Otte, was in charge of the laborers and workmen for Parsons in the performance of this contract, and reported to Hawkins, Jr., who visited the job at least once a day while it was in progress.

Resident engineer Lindemood, whose job it was to see that the contract was carried out according to the plans and specifications, testified that when the addition to the filter plant was not available for use in June 1955 and it became obvious from the daily peaks of water consumption required through May and June that the existing filter beds would not be able to filter the quantity of water required, the district installed by-pass lines. In order to more adequately treat the water which would not be able to pass through the filter beds, it became imperative that some system be developed for treating additional unfiltered water. As a consequence, the by-pass lines were installed for that purpose. The filter beds had a capacity, under normal operation, of passing 72 million gallons of water per day, in every filter bed. Then there was a safety design that made it possible to safely put 90 million gallons of water a day through under an overload condition.

With reference to using the by-pass lines which delivered nonfiltered water to the people of the community, the general superintendent of the water operations for the district testified that all water that went through the by-pass lines was settled water, and it was necessary to apply heavy chlorination to that volume of water that was passed from one basin to the other, so that the district would maintain a potable water. This witness also testified that there were some 35 or 40 days when the volume of water delivered for consumption exceeded the 90 million gallons a day rate during the summer of 1955; that the peak demand was 120 million gallons a day; and that everything over 90 million gallons a day was unfiltered water that went into the community. This witness further testified that this is not a good practice in the waterworks industry, for the reason that: "You are taking a chance on the quality of the water and you are getting retrogression in your treatment process." This witness also testified that the unfiltered water which was delivered through the by-pass lines was treated with chlorine, and every effort was made to keep the water in suitable condition, but there was a chance taken when that was done; and that the usage of unfiltered water treated only with chlorine might have an adverse effect and the sanitary quality might be affected also. With reference to the water that was not filtered, this witness testified: "It was a necessary operation due to the lack of capacity of the filter plant, and on the other hand we were taking some chance in processing the water in that manner, in handling the water in that manner." On cross-examination this witness testified that the district would not intentionally deliver contaminated water to the city, and: "We were still taking a chance on this method of operation in case our judgment was not right."

In this connection, the cost of the by-pass lines and the operation of the same during the summer of 1955, together with the treatment necessary to be used to

make the water potable, would constitute damages accruing to the district.

As heretofore stated, the filter plant was inefficient and could not furnish an adequate water supply. The inefficiency of such plant could not be evaluated on a dollar basis.

Thus, the evidence discloses many elements of damages suffered by the district which are uncertain in nature and amount and difficult of ascertainment, and which are not unreasonably disproportionate to the amount of damages which might have been anticipated as provided for in the contract. This is a case where a provision in the contract for liquidated damages is applicable.

The contractor under the contract in question was familiar with this type of construction and had done more of it than any other contractor in Omaha.

We deem the following to be applicable.

In Wilson & Co., Inc. v. Fremont Cake & Meal Co., 153 Neb. 160, 43 N. W. 2d 657, this court said: " 'Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Parties sui juris bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. The rights of the parties must be measured by the contract which they themselves made. * * *' 12 Am. Jur., Contracts, § 362, p. 928. * * * 'If a party by his own contract creates a duty or imposes a charge on himself, he must under any and all conditions substantially comply with the undertaking.' 12 Am. Jur., Contracts, § 363, p. 930. See, also, Columbus Ry. P. & L. Co. v. Columbus, 249 U. S. 399, 39 S. Ct. 349, 63 L. Ed. 699, 6 A. L. R. 1648; Cameron-Hawn Realty Co. v. Albany, 207 N. Y. 377, 101 N. E. 162, 49 L. R. A. N. S. 922."

In the light of the foregoing, the trial court properly held, as a matter of law, that the damages stipulated

in contract No. C-114 were not a penalty, but provided for liquidated damages.

The plaintiff contends that in the event this court finds that the provision for stipulated damages in contract No. C-114 is valid, then the district is precluded from enforcing this provision of the contract for the reason that the district was in default in its own performance of the contract, and by its acts and omissions delayed Parsons' performance of the contract.

Article FC-19 of contract No. C-114 provides in part as follows: "The Contractor expressly covenants and agrees that in undertaking to complete the work within the time herein fixed, he has taken into consideration and made allowances for all of the ordinary delays and hindrances incident to such work whether growing out of delays in securing materials or workmen, or otherwise. Should the Contractor, however, be delayed in the prosecution and completion of the work by any cause beyond his control, including delayed shipment orders, or by any changes, additions, or omissions therein ordered in writing by the Utilities District, or by the abandonment of the work by the men engaged thereon through no fault of the Contractor; * * * or by neglect, delay or default of any other contractor of the Utilities District, * * * the Contractor shall have no claims for damages for any such cause or delay; but he shall in such cases be granted such extension of the time specified for the completion of the work as the Utilities District shall award in writing on account of such delays, provided, however, that claim for such extension of time is made by the Contractor to the Utilities District in writing within one week from the time when any such alleged cause for delay shall occur.

"The Board of Directors of Metropolitan Utilities District at its sole discretion may waive the above requirements and grant extensions of time for any other reason or reasons it deems valid."

The contractor, Parsons, made five requests in writ-

ing for extensions of time within 1 week from the time an alleged cause for delay occurred, as provided for by article FC-19 of contract No. C-114. One such request for an extension of time was due to the carpenters' strike and was allowed for a period of 15 days. The carpenters' strike began on June 1, 1955, and no work was done by the contractor due to such strike until June 16, 1955, when the strike was settled and the carpenters went back to work.

By letter dated January 10, 1955, Parsons requested an extension of time in the amount of 21 days, due to the relocation of a 42-inch drain line, claiming that it had to cease operation on this work for 21 days. With reference to this request, it was necessary that a change be made to avoid an obstacle that was not known to the parties. The contractor received payment therefor. Hawkins, Sr., testified that he did not believe the obstacle could be determined before it was exposed by excavation. It appears that this item did not prevent the contractor from working. It did cause a halt insofar as that particular item was concerned and a shift in the schedule of operations. If there was any delay by virtue of this item, it appeared to have been of little consequence, insofar as the work on the contract was concerned, because Hawkins, Sr., by a letter, said that the contractor expected to have the building ready for occupation by June 1, 1955, barring labor strikes and with the cooperation of the superintendent of water operations.

The plaintiff claimed a delay beyond its control on account of the bad weather that prohibited doing any work on the project during the winter and spring of 1954 and 1955. A 5-day and a 3-day delay were requested.

The resident engineer's reports disclosed the temperatures at 8 a.m. and 5 p.m. for each day for which Parsons claims an extension of time due to weather conditions, and in addition the amount of work done

on each of said days by Parsons. These reports disclose that the weather was not of such a nature that Parsons could not proceed with its work.

Hawkins, Sr., testified that it is customarily known that in the event of bad weather, overtime might be required to make up the loss in order to complete the project on time, except if the contractor is confronted with such bad weather that it would be necessary to ask for an extension of time. Parsons took the weather in this area into consideration when it bid on the contract. This witness stated that Parsons anticipated it was entirely possible that some additional shift and overtime work would have to be done in the completion of the contract. This extension of time due to weather was denied by the district on the ground that the weather was not unusual in this area, and it was one of the ordinary delays covered by the first sentence of article FC-19 of contract No. C-114 as set forth above.

The plaintiff made a request for an extension of time due to the teamsters' strike which occurred on July 21, 1955, and was in the nature of a secondary boycott. The teamsters' primary dispute was with the Ready Mixed Concrete Company which supplied all of the concrete used by plaintiff in the construction of the filter building extension. Pickets were placed on the project in an endeavor to induce the plaintiff to cease doing business with the Ready Mixed Concrete Company, and such strike was against all the contractors in Omaha who used ready mixed concrete in their work. The plaintiff's employees refused to cross the picket lines. This stoppage of work continued for 21 days. This request was denied by the district because the contractor was in default of its contract when the teamsters' strike started. The plaintiff is not entitled to strike-delay credit after the final completion date of the contract.

No other claim for extension of time was made by the contractor within 1 week from the time when any other

cause for delay occurred during the progress of the work under contract No. C-114.

In Olson Constr. Co. v. Commercial Building & Investment Co., 127 Neb. 609, 256 N. W. 22, quoting with approval from Carter v. Root, 84 Neb. 723, 121 N. W. 952, this court said: " 'Courts have generally held that provisions requiring written notices for additional time must be complied with. * * * Plaintiff herein failed to give notice that additional time was required. The reason that a notice in writing is required is because the contract provides therefor.' "

In the instant case the contractor was aware that requests for time extensions must be in accordance with the contract. This is manifest by the fact that Parsons submitted, within 1 week from the time when an alleged delay occurred as required by article FC-19 of contract No. C-114, five separate requests for extensions of time in asking for a delay. Any and all other extensions of time requested by the contractor were not within 1 week as required by said article, but were by a letter written by Parsons on April 27, 1956. The requests for time thereunder were denied.

There appear to have been six change orders which are a part of contract No. C-114. These changes increased the contract price by $6,484.37, for which the plaintiff was paid. No request for extension of time on account of these changes covered by the six change orders was made until the letter of April 27, 1956, written by Hawkins, Sr., to the district. No claim for extension of time was made by the contractor to the district in writing within 1 week from the time when such changes were ordered or made. The amount of increase by $6,484.37 in a contract of the size here considered would not be an unusual occurrence. Practically every construction job of this magnitude would have delays which cause additional cost to the contractor.

The plaintiff states that in the event this court concludes that the provision for stipulated damages pro-

vided for in the contract is valid as one for liquidated damages, the district is precluded from enforcing it, for the reason that the district was in default in its own performance by its own acts and omissions, and delayed the plaintiff's performance of the contract. In accordance with this, the plaintiff makes reference to certain stop orders by which the plaintiff claims that on at least four occasions it was delayed in its work for causes over which it had no control.

We have heretofore set forth the claim made relating to the 42-inch drain pipe which need not be repeated.

The plaintiff states that the contract called for the facing of the outside walls of the filter building extension with brick which was intended to match as closely as possible the face brick in the existing filter building. The plaintiff submitted samples of brick, and selection was made by the district as being in accordance with the specifications. Brick of the same kind was ordered by the plaintiff and was shipped to the jobsite beginning in December 1954. On March 14, 1955, after some brick had been laid, the plaintiff was ordered to stop all bricklaying work while the district made a further investigation to determine if more suitable brick might be obtained. The plaintiff submitted additional samples. Thereafter the district concluded that the work should continue, using the same brick that had been originally selected, and so directed Parsons on March 29, 1955. The plaintiff claims that during the interim when all the bricklaying work on the project was stopped, the plaintiff's bricklaying crew dispersed and went to other employment; that when the order to resume the work of bricklaying was issued, the plaintiff was unable to obtain a crew of bricklayers to do this work, due to the shortage of bricklayers in Omaha; and that at the time the stop order was issued, the plaintiff had scheduled its work in such a way that the bricklaying crew then working would be continuously employed on the project until all the brickwork was completed. Because

of this stop order, the plaintiff claims it was delayed for a period of 20 days in the performance of its contract.

Article FC-26 of the contract provided in part that: "The Utilities District may at any time suspend the work, or any part thereof, * * *."

Article FC-12 of the contract provided that the engineers were authorized to condemn and reject any defective work or material and so suspend the work when the same was not being properly done.

The record discloses that the contractor was requested to cull out and discard the worst bricks. This occurred in March 1955, and there was no written request made for an extension of time by the plaintiff until April 27, 1956. In other words, the plaintiff failed to comply with the provisions of contract No. C-114.

The plaintiff states that the contract called for the revamping of the heating system in the existing filter building; and that on February 10, 1955, when the plaintiff's subcontractor was ready to commence performance of this work, the district directed that this work be stopped pending further investigation. The district decided that the work should proceed in accordance with the orginal plans and specifications and so directed the plaintiff on March 9, 1955. The plaintiff claims that because of this stop order it was delayed 30 days in the performance of this contract.

Article FC-26 of contract No. C-114 provided that the district had a right to make such a request. Hawkins, Sr., testified that such a request did not keep Parsons from working on the construction of the filter plant extension.

The plaintiff states that the contract called for the construction of a roadway and parking area by the plaintiff; that on November 20, 1954, the plaintiff scheduled a crew and equipment to commence performance in such respect, and was ordered to stop work on this phase of the project; and that the plaintiff had scheduled the work in such a way that the sub-base could be com-

pleted before the area became cluttered with materials. The stop order was rescinded on May 16, 1955. The plaintiff claims that as a result of such stop order it was delayed 21 days in the performance of its contract.

Regarding the roadwork, it was pointed out to the contractor that through November and December was not the best time to get a base for roadwork; and that freezing and thawing conditions that could exist might not be inducive to good construction practice as it relates to roadways and walkways. No request was made with reference to this matter until April 27, 1956. There was some work to be done by the contractor under the contract which entailed a duct line that had to be run through the area where the roadway was supposed to go, and it would have been a mistake to put the roadway in at that time, and subsequently have to tear it up.

The plaintiff states that the specifications provided that the earth under certain parts of the foundation of the filter building extension should be compacted to a density of 95 percent. The plaintiff commenced the work of compacting this soil on October 24, 1954, and continued under the supervision of the district's engineers to attempt to obtain the required compaction in certain areas until the end of November 1954, and found it impossible to obtain such compaction. The engineers waived the requirements and accepted compaction of a lesser density.

Article B-14 of the contract provides in part: "Each bidder shall visit the site of the work and thoroughly and fully inform himself relative to construction hazards and procedure, labor, and all other conditions and factors, local and otherwise, which would affect the prosecution and completion of the work and the cost thereof, * * *. It must be understood and agreed that all such factors have been properly investigated and considered in the preparation of every proposal submitted, as there will be no subsequent financial adjustment, * * * which

is based on the lack of such prior information or its effect on the cost of the work."

Hawkins, Sr., testified that he examined the site before preparing the bid. A soil test could have been made, but it was apparent the contractor preferred to rely on his previous experience and examination of the site.

The plaintiff states that the district failed to require the Bacharach Company to perform its work under contract No. E-110 with due diligence. Engineer Davis fully explained this, and it appears from the evidence that in no event could the contractor under contract No. E-110 proceed to do any substantial amount of work as required by its contract, due to the promises made by Parsons to have certain parts of the structure in proper condition to do such work. This contractor kept in touch with the engineering company, provided a standby superintendent to notify it when it could commence the work, and endeavored to do certain parts of the work at various times to facilitate its contract. Davis testified that the contractor under contract No. E-110 at no time delayed work by Parsons, on the other hand, Parsons did hold up and delay work under contract No. E-110.

The plaintiff contends that the defendant violated article FC-25 of the contract which relates to payments, and in addition makes claim for interest on the amount withheld from the balance due on the contract price, which plaintiff contends was wrongfully withheld. The plaintiff also makes reference to article FC-34 of the contract. In consideration of the said articles of the contract, the plaintiff asserts that the defendant's evidence shows that the contract was substantially and satisfactorily completed not later than April 14, 1956.

There appears to have been a meeting on January 15, 1957, held with the board of directors of the district and at which the plaintiff's counsel was present. Following this meeting the district paid Parsons $10,563.04, as ap-

proved by the board of directors of the district, to be applied on any balance due on the contract, and informed Parsons that the district was retaining the sum of $40,200 as liquidated damages in accordance with the contract provisions. There is no evidence that payments were not made within the time agreed upon after the estimates had been approved by the board of directors of the district, and no violation of the contract as contended for by the plaintiff relating to payments. With reference to the interest claimed by the plaintiff, the trial court's ruling thereon in dismissing the plaintiff's claim therefor was not erroneous.

The plaintiff states that on July 16, 1955, employees of the district accidently flooded an excavation which had been prepared by plaintiff for the reception of a 54-inch water line. On July 21, 1955, after the plaintiff had commenced repairing damages from the first instance, defendant's employees once again flooded the excavation, causing several cave-ins along the side of the trench. In order to repair this damage, it was necessary for plaintiff to clean out the muck from the trench, to recompact the soil, and to re-set several sections of the pipeline which had been placed in the trench prior to the flooding. Plaintiff claimed it was delayed 14 days in the performance of its contract, and incurred $1,441.31 in additional costs by the necessity of repairing this damage. This additional cost was paid by the defendant.

It appears that the plaintiff executed a release in the usual form for this claim. This was a compromise settlement which covered all loss or damage sustained by this claim. The defendant pleaded this settlement in its answer and the same was admitted in the plaintiff's reply. We believe the trial court properly excluded the evidence relating to the above item because the plaintiff failed to file a claim for extension of time as provided for by the contract.

There is much evidence with respect to the progress

of the work under contract No. C-114, which is mostly contained in letters written by the parties to the action.

It appears from the record that a conference was held in the office of the district on December 20, 1954, attended by the Messrs. Hawkins, the district's attorney, and the engineers. In that conference Hawkins, Sr., agreed to have the building ready for operation by June 1, 1955, and this was confirmed by a letter on January 27, 1955. This was after the engineers wrote a letter to Parsons on January 19, 1955, calling attention to contract No. C-114 and the lack of progress on the part of Parsons in progressing the construction work.

On February 9, 1955, the plaintiff submitted a progress schedule which had a completion date of June 30, 1955. Hawkins, Sr., said that the revised progress schedule submitted was to appease the district and its engineers so that it would start to release Parsons' money.

The record shows that on March 4, March 10, and March 18, 1955, the resident engineer wrote Parsons to the effect that certain items in the contractor's schedule had not been completed and were past the completion dates, and requested Parsons to work on weekends to facilitate the completion of the project.

On April 4, 1955, the plaintiff started a second shift consisting primarily of carpenters and labor helpers erecting form work. This second shift was maintained until May 16, 1955.

On April 28, 1955, the resident engineer wrote a letter to the plaintiff reminding it that a considerable amount of work would be required on the project to be ready for the installation of equipment under contract No. E-110, and other items that needed attention, and also recommended that plaintiff work a full double shift 7 days a week until the building was ready for the equipment installation and the sealing weir completed.

When the contractor discontinued the second shift, a conference was called on May 18, 1955. This conference was attended by Mr. Detweiler, the district's engineer,

Messrs. Hershey and Dons of the Bacharach Company which had the equipment contract, and the Messrs. Hawkins. The resident engineer testified that the occasion was that as a result of the delay in progress a double shift had been set up and during the work earlier in May this shift had been discontinued, and an endeavor was made to establish what had caused the discontinuance of the double shift. At that time the job was not sufficiently completed so the representatives of the equipment contractor were present to ascertain what kind of a schedule could be made so they could proceed with their work and be able to continue their work to the completion of contract No. E-110. At this meeting the resident engineer asked Hawkins, Sr., when he could get the job done. Hawkins, Sr., stated that Parsons could get the job done in the early part of July 1955; that he anticipated finishing the job to where the district could put the extension to the filter building to use in the summer of 1955; and he definitely promised to have the building ready.

On January 26, 1956, Hawkins, Sr., sent a letter to the resident engineer. In this letter the writer was referring to two or three matters, and stated that everyone had operated in good faith and had been realistic in trying to avoid difficulties. Further the letter stated that the writer would like to see these two jobs settled on the basis of no penalties against anyone; no penalties against contract No. C-114 on the filter building, no penalties in the way of additional costs by Parsons on the basins against the district, no additional costs by Parsons for setting Walker equipment, and no penalties by reason of extending additional equipment costs by the district against Walker.

On March 1, 1956, Hawkins, Sr., sent a letter to the general manager of the district in which he said: "On the Filter Plant our time completion is subject to criticism and I know was not satisfactory to the District or your Engineers. Neither was it satisfactory to us, al-

though we made every reasonable attempt to make it so. I do not believe there are any questions on the work itself or the class of workmanship or additional contract work. I have indicated by letter to your Engineers the manner in which we feel the finals on these two jobs should be closed out. I also feel they are fair, equitable, and to the best interests of the District to be considered in the manner described. I also feel they can be done so without any conflicts with our contracts."

The contractor's letter of March 1, 1956, was acknowledged by the general manager of the district on March 9, 1956, who suggested that the contractor explain the reason for the delays and why the contractor felt the extensions of time should be granted.

On April 27, 1956, the contractor sent a letter to the general manager of the district which contained the following: "If you will review the delays and difficulties occurring during the construction of the Filter Plant addition and the Basins you will find that they were unavoidable and not due to neglect on the part of any one particular party. We are requesting that in lieu of trying to determine proper time extensions that you not assess any liquidated damages and that these two jobs be settled on the basis of my letter to you of March 1, 1956 and my letter to the Engineers of January 26, 1956."

In the case of George W. Condon Co. v. Loup River Public Power Dist., *supra,* referring to a construction contract without a "no damage" clause, this court said: "* * * it is expressly provided that no claim such as here presented shall be valid unless the contractor gives the engineer written notice thereof before the performance of the work, and no such notice in writing was even given. In fact, none of these provisions was complied with by plaintiffs, and the terms of the contract upon which they sue, under these circumstances, forbid recovery by them." See, also, Psaty & Fuhrman,

Inc. v. Housing Authority, 76 R. I. 87, 68 A. 2d 32, 10 A. L. R. 2d 789.

In A. Kaplen & Son, Ltd. v. Housing Authority, 42 N. J. Super. 230, 126 A. 2d 13, it is said: "Stipulations like the questioned proviso are obviously conceived in the public interest in protecting public agencies contracting for large improvements on the basis of fixed appropriations or loan commitments against vexatious litigation based on claims, real or fancied, that the agency has been responsible for unreasonable delays." Numerous cases are cited to the same effect.

None of the foregoing items involved any wrongdoing on the part of the engineers or the district. There is no breach of contract which would entitle the plaintiff to damages from the defendant. If the contractor was delayed and was damaged thereby, the remedies are spelled out in the contract.

While we have set forth evidence pertaining to the alleged delays caused plaintiff by the flooding of the weir chambers and pipe trenches, evidence concerning soil compaction, and evidence relating to alleged damages caused by the acts and omissions of the defendant and those for whom the defendant was responsible, the trial court refused to admit some evidence relating to the foregoing and, in addition, refused to admit evidence relating to the water system improvements report and the supplemental report on water system improvements. Most of this evidence has been covered in this opinion. However, a careful examination of the record discloses that the trial court did not err in the admission or rejection of certain evidence as contended for by the plaintiff.

There are items such as a delay in obtaining the proper crane rail, the delivery of materials, and other minor items which Parsons claims delayed the progress of its work and for which the district was responsible. It appears that either such items were not pleaded by the plaintiff in its petition, that Parsons failed to comply

with the proper procedure relating to such matters, or that Parsons failed to give proper notice as required by contract No. C-114.

In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which the jury can find a verdict for the party producing it, and upon whom the burden of proof is imposed. See, Christ v. Nelson, 167 Neb. 799, 95 N. W. 2d 128; Johnsen v. Taylor, 169 Neb. 280, 99 N. W. 2d 254.

In accordance with the above rule, the trial court properly dismissed the plaintiff's petition.

For the reasons given herein, the judgment of the trial court should be, and is hereby, affirmed.

AFFIRMED.

PATRICK PHILLIPS, APPELLANT, IMPLEADED WITH HELEN PHILLIPS, APPELLEE, V. WILLIAM H. PHILLIPS ET AL., APPELLEES.

104 N. W. 2d 52

Filed July 8, 1960. No. 34776.

1. **Partition.** A referee in partition is an officer of the court. Ordinarily a court should not appoint someone to act as referee in a matter who is either biased or prejudiced against any party to the action who has an interest therein. Objections to the appointment of anyone to act as referee, on the ground of his being biased or prejudiced, are addressed to the sound discretion of the court making the appointment and the overruling thereof will not be set aside unless the record affirmatively shows that such discretion has been abused.
2. ———. As between a partition in kind or sale of land for division, courts will favor partition in kind, since it does not disturb the existing form of inheritance or compel a person to sell his property against his will.
3. ———. Generally, the burden is on those who seek a sale of the property in lieu of partition in kind, to establish by a preponderance of the evidence the existence of a statutory ground for such sale.

APPEAL from the district court for Morrill County: RICHARD M. VAN STEENBERG, JUDGE. *Affirmed.*

Paul Rhodes, for appellant.

Robert J. Bulger and *Wm. W. Graham*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Morrill County. It involves an action commenced in that court by Patrick Phillips and his wife to partition mineral interests, including oil, gas, and hydrocarbons, in certain real estate located in Morrill County, Nebraska. Such actions are authorized by section 25-2170.01, R. R. S. 1943, and are governed by the general statutes relating to partition actions.

The court rendered a judgment in which it determined the interests of the parties to the partition action in and to the mineral interests involved and quieted and confirmed such interests accordingly and ordered partition thereof. No appeal was taken therefrom to this court and no complaint is here made that such interests were not correctly determined and that partition thereof is not proper. The court then appointed James L. Macken, a member in good standing of the legal profession, referee to partition such mineral interests. Patrick Phillips objected to the appointment of James L. Macken to serve as referee and, after his appointment, moved that his appointment be set aside and that a fair and impartial referee be appointed. The reasons given for his objections to the appointment and for his motion to vacate the appointment are hereinafter set forth and discussed. This motion the trial court overruled.

The referee made and filed his report wherein he stated: "That your Referee finds that the only properties here for division are mineral interests located in

an area where there has been only limited drilling and exploration for oil, gas or minerals, where there has been no production of oil, gas or minerals; that the mineral value as to the land here involved, has not been determined and is at this time highly speculative; that there is no ascertainable difference in value between the mineral interest in one portion of this real estate and the value of the mineral interest in any other portion of this real estate; that said premises are presently not subject to oil and gas lease; * * *." Based thereon, he recommended to the court: "* * * that partition of the mineral interests in the real estate herein be made in kind according to the recommendations embodied in this report," setting out in full his recommendations in that respect.

Patrick Phillips objected to the report of the referee, primarily on the ground: "That the said proposed division in kind constitutes a checker boarding of the acreage, making a mineral lease and development almost impossible." The trial court overruled these objections, confirmed the report of the referee, and ordered a division in kind as recommended by the referee, which is as follows:

"IT IS FURTHER ORDERED that as to the following real estate, to-wit: Section Thirteen (13), Township Nineteen (19) North, Range Forty-seven (47), West of the 6th P. M., Morrill County, Nebraska, that said real estate be divided into eight tracts of eighty acres each and that Patrick Phillips, Charles O. Phillips, whose correct name is Charles R. Phillips, Hazel Passmore and Mary Caraway, be each assigned by lot, the mineral interest, including oil, gas and hydrocarbons in or under the particular eighty acre tract assigned to them or that may be produced therefrom for a term expiring April 29, 1982, and in the event there is production of oil, gas or hydrocarbons from said real estate prior to said date, for as long thereafter as such production continues; and that the mineral interests in the remainder of said

real estate be assigned to the defendant, William H. Phillips, together with the reversion upon the expiration of the term mineral interests above specified; that the interest of the said William H. Phillips shall be subject to mortgage to the Federal Land Bank and that the interests of Patrick Phillips, Charles O. Phillips, Hazel Passmore and Mary Caraway, in minerals shall be free and clear of the lien and obligation of the mortgage of the Federal Land Bank.

"IT IS FURTHER ORDERED as to the following described real estate, to-wit: Section Thirty-two (32), Township Nineteen (19) North, Range Forty-six (46), West of the 6th P. M., Morrill County, Nebraska, that said real estate be divided into eight tracts of eighty acres each; that Charles R. Phillips, Hazel Passmore and Mary Caraway be each assigned by lot, the mineral interest, including oil, gas and hydrocarbons in or under the particular eighty acre tract assigned to them or that may be produced therefrom for a term expiring April 29, 1982, and in the event there is production of oil, gas or hydrocarbons from said real estate prior to said date, for as long thereafter as such production continues; that the balance of the mineral interest in said real estate be assigned to Patrick Phillips, together with the right of reversion upon the expiration of such term interests of Charles R. Phillips, Hazel Passmore and Mary Caraway.

"IT IS FURTHER ORDERED that as to the following described real estate, to-wit: Lots Three (3) and Four (4), and the East Half of the Southwest Quarter (E½ SW¼) of Section Thirty (30); Lots One (1) and Two (2), and the East Half of the Northwest Quarter (E½NW¼) and the Northeast Quarter (NE¼) of Section Thirty-one (31), all in Township Nineteen (19) North, Range Forty-six (46), West of the 6th P. M., Morrill County, Nebraska, that said real estate be divided into tracts as follows, to-wit:

Tract 1: Lots Three (3) and Four (4), Section Thirty (30).

Tract 2: The East Half of the Southwest Quarter (E½SW¼) of Section Thirty (30).

Tract 3: Lots One (1) and Two (2) of Section Thirty-one (31).

Tract 4: The East Half of the Northwest Quarter (E½NW¼) of Section Thirty-one (31).

Tract 5: The West Half of the Northeast Quarter (W½NE¼) of Section Thirty-one (31).

Tract 6: The East Half of the Northeast Quarter (E½NE¼) of Section Thirty-one (31); that all of the oil, gas and mineral interest in one of said tracts be assigned by lot in perpetuity to Hazel Passmore; that the oil, gas and mineral interest in perpetuity in sixty acres out of one of such tracts be assigned by lot to Charles R. Phillips; and that all of the mineral interest in sixty acres, including oil, gas or hydrocarbons in or under or that may be produced therefrom for a term expiring April 29, 1982, and in the event there is production of oil, gas or hydrocarbons from said real estate prior to such date for as long thereafter as such production continues, be assigned by lot to Mary Caraway; that the mineral interest in the balance of said real estate be assigned to the plaintiff, Patrick Phillips, together with the right of reversion upon the expiration of the term interest of the defendant, Mary Caraway; the interest of Patrick Phillips to be subject to mortgage to the Federal Land Bank of Omaha, and the interests of the other parties above set forth to be free and clear of mortgage to the Federal Land Bank of Omaha.

"IT IS FURTHER ORDERED that upon determination by lot of the exact tracts to be received by the respective parties, that the Referee be, and he hereby is, ordered to execute conveyances to each of the parties of their respective interests in minerals, oil and gas as above set forth."

Patrick Phillips has appealed from the rendition of the foregoing decree of partition in kind as rendered by the trial court.

Appellant raises two questions on appeal. The first, was James L. Macken biased and prejudiced in any manner so that he could not serve as a fair and impartial referee in this partition action and, if so, was it error for the trial court to appoint him to act in that capacity?

A referee in partition is an officer of the court. Knouse v. Knouse, 157 Neb. 748, 61 N. W. 2d 388. Ordinarily a court should not appoint someone to act as referee in a matter who is either biased or prejudiced against any party to the action who has an interest therein. Objections to the appointment of anyone to act as referee, on the ground of his being biased or prejudiced, are addressed to the sound discretion of the court making the appointment and the overruling thereof will not be set aside unless the record affirmatively shows that such discretion has been abused.

As a basis for his contention appellant, in support of his motion to vacate the appointment, stated: "That James L. Macken is an attorney in a case in the District Court of Morrill County, Nebraska, in which Paul Rhodes is plaintiff and Ernest W. Taylor and Evelyn Taylor are defendants; that he is attorney for the defendants in said action and is personally appearing against this plaintiff's attorney in said action, which causes bitter and ill feeling and for that reason makes it impossible for the said James L. Macken to be a fair and impartial referee in this action, * * *."

Paul Rhodes is counsel for appellant in this action. The record shows that Rhodes brought an action in his own behalf in the county court of Morrill County against Ernest W. Taylor and Evelyn Taylor; that James L. Macken represented the defendants therein; that James L. Macken filed an affidavit in that action seeking to prevent Rhodes from taking the deposition of certain persons named therein for the reason, as therein set

forth, "* * * that in attempting to take the depositions of said persons ostensibly for this case, plaintiff is merely using this case as an instrument, his real purpose being to further his interests in certain other potential litigation not remotely connected with this case; that the taking of these depositions would result in grave injustice to defendants in that they or their counsel must appear at the taking of the depositions to protect defendants, resulting in substantial expenditure of money because of the great distance involved, and for no good reason in view of the irrelevancy of the proposed depositions; * * *." It would appear, from the deposition of Evelyn Taylor, that the foregoing litigation, which is now apparently pending in the district court for Morrill County on appeal, relates to a right the Taylors claim to keep certain money now in their possession which they seek to hold for services rendered to Rhodes for operating a drug store for him and which money Rhodes is seeking to recover from them. This litigation has no relation to this action and the parties involved herein.

Unfortunately it appears that Rhodes has become embittered toward Macken because he, Macken, represented clients opposed to Rhodes in the litigation hereinbefore referred to but there is no showing that Macken reacted in the same manner. Ordinarily members of the legal profession do not let the fact that they represent opposing interests in contested litigation affect their personal relations for often the same lawyers may represent opposing interests in one case and be associated together in another. That is the proper relationship that should arise therefrom. There is absolutely no showing in this case that Macken was in any way biased or prejudiced against either Rhodes or any of the parties to this action. The trial court, therefore, did not abuse its discretion when it appointed Macken to act as referee.

We come then to the second question raised by ap-

pellant which is, was it proper, under the circumstances here shown, for the trial court to order a partition in kind in the manner that it did?

Section 25-2181, R. R. S. 1943, provides: "If it appears to the referee or referees that partition cannot be made without great prejudice to the owners, they shall so report to the court."

"As between a partition in kind or sale of land for division, courts will favor partition in kind, since it does not disturb the existing form of inheritance or compel a person to sell his property against his will." Trowbridge v. Donner, 152 Neb. 206, 40 N. W. 2d 655. Therein we went on to say: "It is pertinent, also, that a sale in partition cannot be decreed merely to advance the interests of one of the owners, but that before ordering a sale the court must judicially ascertain that the interests of all will be promoted, thereby bearing in mind that the 'generally accepted test of whether a partition in kind would result in great prejudice to the owners is whether the value of the share of each in case of a partition would be materially less than his share of the money equivalent that could probably be obtained for the whole.' 40 Am. Jur., Partition, § 83, p. 74."

"Generally, the burden is on those who seek a sale of the property in lieu of partition in kind, to establish by a preponderance of the evidence the existence of a statutory ground for such sale." Trowbridge v. Donner, *supra.*

The evidence shows there has never been any production of gas, oil, or hydrocarbons on the 1,760 acres of land herein involved. In fact, there has never been any exploratory drilling on it and the only holes drilled near it, which are some miles away, were all dry. The nearest production is 16 miles away. It is not now under any oil or gas lease. In view of these facts it is referred to as a wildcat area. It does, however, have some mineral potential but the extent thereof is unknown

and highly speculative. This potential is, at present, the same for the entire area although, if developed, some tracts may become more productive than others.

Dividing the mineral rights into smaller units or tracts will undoubtedly affect the possible leasing and development of this area adversely. However, the evidence also shows that it is very doubtful if a lease to explore and develop this area for gas and oil could presently be secured even if the entire tract of 1,760 acres was covered thereby because the mineral interests therein are of such doubtful value. Whether the mineral interests therein could or could not be sold at this time is also very speculative because of the foregoing. If, on the other hand, production should hit this area these mineral rights would become very valuable. In such circumstances the evidence discloses there would be no trouble leasing 80-acre tracts. To force a sale of these mineral rights at this time would be of little, if any, value to the present owners thereof whereas, if each can retain an interest therein by division in kind, he may reap a rich reward therefrom. Under these circumstances we think the trial court was correct in doing what it did.

AFFIRMED.

EMIL C. BLOMQUIST ET AL., APPELLEES, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, APPELLANT.
104 N. W. 2d 264

Filed July 8, 1960. No. 34780.

1. **Improvements.** As a general rule, improvements of a permanent character, made on real estate and attached thereto without the consent of the owner of the fee, by one having no title or interest, become a part of the realty and vest in the owner of the fee as his own property.
2. **Improvements: Landlord and Tenant.** The general rule that improvements which become a part of the real estate may not be

removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise.

3. **Improvements.** Trees growing on land, in the absence of agreement or statute indicating otherwise, are a part of the land.
4. **Public Lands.** The Board of Educational Lands and Funds under the leasing provisions of statute is without authority to sell directly or in effect a part of the fee.
5. **Pleading.** The courts are without authority to grant relief on a patently invalid pleaded cause of action.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Reversed and dismissed.*

Clarence S. Beck, Attorney General, and *Richard H. Williams*, for appellant.

Ginsburg, Rosenberg & Ginsburg and *Norman Krivosha*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action by Emil C. Blomquist and Orpha P. Blomquist, husband and wife, as joint tenants under a lease of Section 36, Township 28, Range 23, in Brown County, Nebraska, plaintiffs and appellees, against the Board of Educational Lands and Funds of the State of Nebraska, an agency and department of the State of Nebraska having charge of all school lands owned by the state or land, title to which may vest in the state, and having authority to adopt rules for that purpose and to lease such lands, defendant and appellant. The purpose of the action is to have determined the rights and interest of the parties under the lease; to have it adjudged that the plaintiffs have the right to remove or dispose of trees on the land; to have it determined that on the termination of the lease the trees remaining on the land shall be appraised, the value determined, and the value thereof paid to plaintiffs; to have the defendant enjoined from claiming any title or interest

in the trees; and, on the negotiation of a new lease, to have plaintiffs recognized as the owners of the trees.

As ground for the relief sought the plaintiffs, to the extent necessary to state here, pleaded that they had been tenants on the land under lease from the defendant since 1934; that between 1941 and 1944 they planted on the land 20 acres of trees which consisted of cedar, pine, ash, chinese elm, hackberry, cottonwood, and plum for their general use, for shelter and posts, and for possible commercial purposes; that the trees were fully grown in the summer of 1958; that they had a market value of more than $6,000 and that they increased the value of the real estate; that the lease of plaintiffs expired on January 1, 1959; that in order to protect the interest in the trees which the plaintiffs claimed under the provisions of section 72-240.06, R. R. S. 1943, it became necessary for them to pay to the defendant as rental $3,550 for a renewal lease, which otherwise they would not have been required to pay; that the lease so procured was for 12 years from January 1, 1959; that the trees planted by the plaintiffs are their property; and that the provision under which they make their claim for the relief prayed is the following from section 72-240.06, R. R. S. 1943: "Improvements to be included in such appraisement shall be all buildings, fencing, wells, windmills, pumps, tanks, irrigation improvements, dams, drainage ditches, conservation terraces, trees, plowing for future crops, and alfalfa or other crops growing thereon."

To the petition of plaintiffs the defendant filed a demurrer. The ground of the demurrer was that the petition did not state facts sufficient to constitute a cause of action in that the portion of section 72-240.06, R. R. S. 1943, relating to trees is unconstitutional and void as an attempt to bestow a special benefit upon persons holding school land leases at a certain time at the expense of the school land trust.

The demurrer was overruled, whereupon the defend-

ant elected to stand thereon and refused to plead further. A judgment was thereupon rendered granting the relief prayed for in the petition of the plaintiffs. From this judgment the defendant has appealed.

As has been pointed out in what has been said the claim of plaintiffs is based upon a claimed right which they contend flows from section 72-240.06, R. R. S. 1943, coupled with acts performed between the years 1941 and 1944. As also pointed out the defendant contends that the provision on which the plaintiffs rely is unconstitutional and void. The particular provisions from which this controversy stems are as follows: "All authorized improvements on school land leases shall become the property of new lessees in all instances, and payment shall be made to the old lessees as herein provided. * * * If the parties are unable to agree as to the value of all the improvements on the land, such improvements shall be appraised by a board of three appraisers * * *. Improvements to be included in such appraisement shall be all buildings, fencing, wells, windmills, pumps, tanks, irrigation improvements, dams, drainage ditches, conservation terraces, trees, plowing for future crops, and alfalfa or other crops growing thereon."

It becomes necessary however before entering upon a discussion of these questions to consider pertinent, perhaps controlling, factors in the determination of this case without reaching the questions which have been presented by the pleadings, the judgment, or the briefs of the parties on appeal. The matters to which reference is here made are the origin and history back of section 72-240.06, R. R. S. 1943, the time when the acts of plaintiffs were performed, and the legal significance of the planting of trees upon the land.

It is to be observed that the first sentence of the section of the statute which has become the center of this controversy makes the subject involved "all authorized improvements on school land leases." The stat-

ute then declares that the ownership of the authorized improvements shall pass to the new tenant in case of the transfer of the lease. Conditions of transfer are prescribed but a statement of them is not required herein. It should be said here however that the transfer contemplated is not to be made by the defendant, but from an old to a new lessee, on terms and conditions imposed by the statute.

It becomes important next to observe that the authorized improvements designated in the statute are "buildings, fencing, wells, windmills, pumps, tanks, irrigation improvements, dams, drainage ditches, conservation terraces, trees, plowing for future crops, and alfalfa or other crops growing thereon." Of special significance is the fact that in the present statute trees are within the classification.

In varying terminology but in a single sense the statutes, from a time long prior to the date of the commencement of the first tenancy of plaintiffs to the present time, contained an enumeration of the improvements to which title passed, under stated restrictions, from an old to a new lessee. For convenience this history will start with section 72-218, Comp. St. 1929, which was prior to the commencement of the first tenancy, and follow through with Laws 1935, c. 163, § 11, p. 604; § 72-240, R. S. 1943; Laws 1947, c. 235, § 7 (7), p. 750; Laws 1953, c. 255, § 1, p. 862; and Laws 1957, c. 303, § 1, p. 1107, which is now section 72-240.06, R. R. S. 1943.

It was not until the adoption of the act of 1953 that "trees" were included in the enumeration of improvements which were to pass from the old to the new lessee. This act of 1953 was declared unconstitutional in Watkins v. Dodson, 159 Neb. 745, 68 N. W. 2d 508. In that case it was said: "An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations."

As indicated the present section 72-240.06, R. R. S.

1943, was enacted in 1957. For the first time, therefore, in that year there was a statutory provision on its face valid enumerating trees as improvements and providing for their transfer from an old to a new lessee. This was 13 years after completion of the planting of trees by the plaintiffs.

It is further noted that in the rules of defendant "trees" were not enumerated as improvements passing with the change of lessees until December 8, 1958, when rule 2 of the rules relating to improvements was filed with the Secretary of State.

It becomes clear from this history that regardless of the pleadings and the presentations by the parties in their briefs that the status of these trees is essential to a proper determination of whether or not the plaintiffs are entitled to any of the relief for which they pray in their petition and which they were awarded by the judgment of the district court. If they have no ownership in the trees, this court is not called upon to pass in this case upon the constitutionality of section 72-240.06, R. R. S. 1943.

Without any apparent dispute it appears that the trees in question were improvements of a permanent character made on this real estate and in the very nature of things attached thereto. They were placed on the land, and it is not pleaded that they were so placed with the consent of the defendant. Under the general rule as set forth in 27 Am. Jur., Improvements, § 3, p. 261, as follows, they became a part of the realty and title thereto vested in the State of Nebraska as trustee of the school lands of the state from the date of planting: "As a general rule, improvements of a permanent character, made on real estate and attached thereto without the consent of the owner of the fee, by one having no title or interest, become a part of the realty and vest in the owner of the fee as his own property * * *." See, also, Friedlander v. Ryder, 30 Neb. 783, 47 N. W. 83, 9 L. R. A. 700; Frost v. Schinkel, 121 Neb. 784, 238 N.

W. 659, 77 A. L. R. 1381; Watson Bros. Realty Co. v. County of Douglas, 149 Neb. 799, 32 N. W. 2d 763; Nilson Bros. v. Kahn, 314 Ill. 275, 145 N. E. 340; Reese v. Jared, 15 Ind. 142, 77 Am. Dec. 88; Graham v. Connersville & N. C. J. R. R. Co., 36 Ind. 463, 10 Am. R. 56; Atchison, T. & S. F. R.R. Co. v. Morgan, 42 Kan. 23, 21 P. 809, 4 L. R. A. 284, 16 Am. S. R. 471; Kingsley v. McFarland, 82 Me. 231, 19 A. 442, 17 Am. S. R. 473; Peirce v. Goddard, 39 Mass. 559, 33 Am. Dec. 764; Butler v. Page, 48 Mass. 40, 39 Am. Dec. 757; Pomeroy, Wilson & Butler v. Lambeth, 36 N. C. 65, 36 Am. Dec. 33; Jones v. Shufflin, 45 W. Va. 729, 31 S. E. 975, 72 Am. S. R. 848.

The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise. See 51 C. J. S., Landlord and Tenant, § 399 (a), p. 1141.

It is noted that in Reese v. Jared, *supra,* is contained a pertinent declaration that trees are improvements, and lumber while in a tree is real estate. Nothing has been found to indicate that they shall be treated otherwise in the absence of statute or agreement.

The petition is not predicated on an agreement when or after the plaintiffs became lessees of this land, nor on a statute which directly or by reasonable inference permits a removal of these trees. It is true that a statute does indicate that movable improvements are the property of the lessee. § 72-238, R. R. S. 1943. See, also, State v. Platte Valley Public Power & Irr. Dist., 147 Neb. 289, 23 N. W. 2d 300, 166 A. L. R. 1196. As is made clear trees growing on land are not movable improvements. They are, as pointed out, a part of the land. The petition is predicated, in the light of the history set forth herein, on a mere leasehold or leaseholds containing no reference to agreement with regard to trees, and without any statute which at the time of planting di-

rectly or by reasonable inference gave to the plaintiffs an interest in trees. As pointed out planting ended in 1944. Thus since there was no authority upon which to base a claim for these trees as improvements subject to removal, the judgment of the district court was erroneous.

If it should be contended that the present section 72-240.06, R. R. S. 1943, has the effect of granting retroactively ownership or interest in these trees it becomes difficult to see how the contention could be sustained. These trees became and are a part of the fee and have been since 1944. This court said in State v. Platte Valley Public Power & Irr. Dist., *supra*: "The board under the leasing provisions of the statute is without authority to sell directly or in effect a part of the fee."

This conclusion necessitates a rejection of the pleaded cause of action and a dismissal thereof without passing upon the constitutionality of section 72-240.06, R. R. S. 1943, since nothing is before the court for decision which depends upon its constitutionality. This conclusion conforms to the following which was said in Jessen v. Blackard, 160 Neb. 557, 71 N. W. 2d 100, concerning the duty of the court when a pleaded issue is not on any true basis before the court for consideration: "Under these authorities it is clear that the court has a duty of its own to perform. It may not properly grant relief based upon a statute which is nonexistent or one which has become nonexistent by reason of judicial declaration of unconstitutionality by this court whether the question has been raised by the parties or not." This statement refers to declaration of unconstitutionality as a basis for the pronouncement but of course it has application in any situation where it becomes apparent that the pleaded issue is not before the court for determination.

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

A. LOWELL JOHNSON, ADMINISTRATOR DE BONIS NON WITH WILL ANNEXED OF THE ESTATE OF EDWIN YODER, DECEASED, APPELLANT, V. FLORENCE L. MUNSELL ET AL., APPELLEES, IMPLEADED WITH ALTA YODER, INDIVIDUALLY, AND MARK A. BUCHHOLZ, GUARDIAN OF ALTA YODER, APPELLEES.

104 N. W. 2d 314

Filed July 15, 1960. No. 34777.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Executors and Administrators.** The term "administrator de bonis non," used in reference to the administration of estates by the courts of this state, means an administrator who has been appointed in the place of a former administrator or executor who has ceased to be such after partial administration of the estate.
3. ———. The administrator de bonis non has all the powers of his predecessor and is authorized to and should prosecute an action if he in good faith believes it necessary for the recovery of a debt owing the estate.
4. **Partnership.** A sale, conveyance, transfer, or assignment by a partner of his interest in the partnership to a copartner does not of itself dissolve the partnership, although the entire circumstances connected with such a transfer may be sufficient to bring about its dissolution.
5. ———. A partner's conveyance of his interest in the partnership property to a copartner operates as a dissolution of the partnership only when it is clear that the partners contemplated and intended the entire withdrawal from the partnership of such partner and the termination of the partnership as between themselves, and their intention may be manifested by agreement of the parties.
6. **Witnesses.** The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true.
7. **Partnership.** Upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may ordinarily carry on the same line of business at the same place as was transacted the firm business, without liability to ac-

count to the legal representative of the deceased partner for the good will of said firm, in the absence of their own agreement to the contrary.

8. ———. In the absence of an agreement therefor, or of special circumstances, a surviving partner is not ordinarily entitled to compensation for his services in winding up and settling the partnership affairs.

9. ———. However, a surviving partner is ordinarily entitled to compensation for his services out of profits earned by the deceased partner's capital which he continues to use in the business with consent of the representative of deceased, and even if without consent of the representative of the deceased partner a surviving partner so continues the business at his own risk and makes a profit, the estate is bound to allow reasonable compensation for his services if it elects to share in the gains or profits so made.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed as modified.*

Barney, Carter & Buchholz, for appellant.

Sterling F. Mutz, for appellees Munsell et al.

Mark A. Buchholz, for appellees Yoder et al.

Heard before MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, A. Lowell Johnson, as administrator de bonis non with the will annexed of the estate of Edwin Yoder, deceased, filed this action on June 21, 1958, against defendants, Florence L. Munsell, Lydiellen Hagen, Aldine Lindeman, and Don W. Munsell, allegedly doing business in the partnership name of Munsell's Mineral Products Company, and said company, a copartnership. Upon motion of defendants and after hearing thereon, Alta Yoder, the incompetent surviving wife of Edwin Yoder, deceased, and Mark A. Buchholz, her duly appointed, qualified, and acting guardian, were made parties defendant, and upon application of defendants in open court said guardian was appointed guardian ad litem for Alta Yoder.

Hereafter, A. Lowell Johnson will be called plaintiff; Munsell's Mineral Products Company will be called the company; Florence L. Munsell will be called Mrs. Munsell; Lydiellen Hagen will be called Mrs. Hagen; Aldine Lindeman will be called Mrs. Lindeman; and Don W. Munsell will be called Don. All such individually-named defendants were children of Mrs. Munsell and all were surviving partners in defendant company except Mrs. Hagen when Edwin Yoder, one of the partners, died on November 6, 1953. When referring to all such surviving partners and the company, they will be called defendants. Edwin Yoder, deceased, will be called Mr. Yoder; Alta Yoder will be called Mrs. Yoder; and Mark A. Buchholz, guardian and guardian ad litem, will be designated as such.

The purpose of plaintiff's action was to obtain an accounting against the alleged surviving partners and the company in order to obtain a determination of the value of Mr. Yoder's interest in the company, including his alleged share of good will of the business at the time of his death; and to recover same, together with profits of the company from November 6, 1953, up to the time the amounts found due plaintiff are paid in lieu of interest on Mr. Yoder's alleged capital contribution to the company during said time.

Plaintiff's petition alleged that on October 1, 1937, Mr. Yoder, Mrs. Munsell, Mrs. Hagen, Mrs. Lindeman, and Don duly entered into a written partnership agreement and became partners in defendant company, after which time they engaged in the business of selling mineral products in the name of the company. A copy of such agreement was attached to and made a part of plaintiff's petition. His petition alleged that said company commenced doing business under that agreement on or about October 1, 1937; that the partnership continued to do so up until November 6, 1953, the date of Mr. Yoder's death; and that defendant surviving partners have continued their partnership business since

November 6, 1953. Plaintiff's petition also alleged, as shown by the agreement, that on October 1, 1937, Mrs. Munsell's interest in the partnership was 46.09 percent; Mr. Yoder's interest was 17.26 percent; Mrs. Hagen's interest was 12.22 percent; Mrs. Lindeman's interest was 12.21 percent; and that Don's interest was 12.22 percent. However, plaintiff's theory of recovery was that on June 24, 1946, Mrs. Munsell assigned 7.74 percent of her interest in the partnership to Mr. Yoder, leaving Mrs. Munsell with a 38.35 percent interest and Mr. Yoder with a 25 percent interest; that on March 30, 1953, Mrs. Hagen assigned her 12.22 percent interest to Mrs. Munsell, leaving her with a 50.57 percent interest; and that such assignments as a matter of law dissolved the partnership and freed the remaining partners from the obligations of the October 1, 1937, partnership agreement; that in the absence of any new agreement, either oral or written thereafter, all rights and duties must be determined under the provisions of the Uniform Partnership Act; that when Mr. Yoder died on November 6, 1953, the then existing partnership became dissolved under section 67-329, R. R. S. 1943; and that as a matter of law under the circumstances heretofore recited and the provisions of section 67-342, R. R. S. 1943, plaintiff was entitled to an accounting and the recovery sought herein.

In that connection, it is well to point out here that the written and witnessed assignment of 7.74 percent interest by Mrs. Munsell to Mr. Yoder on June 24, 1946, is attached to and made a part of plaintiff's petition. Therein it recites that it was understood and agreed that all terms and conditions of the October 1, 1937, partnership agreement should remain in full force and effect except as to the change of percentage of ownership occasioned by such assignment. Also, without dispute and with Mr. Yoder's consent and agreement, the partnership so continued to operate thereafter under the partnership agreement until Mr. Yoder's death.

Further, on June 12, 1953, after Mrs. Munsell had received an assignment from Mrs. Hagen of her 12.22 percent interest on March 30, 1953, Mrs. Munsell, by written and witnessed assignment, transferred 12½ percent of her interest to Mr. Yoder for life, with remainder to Mrs. Munsell after Mr. Yoder's death. That assignment also admittedly recited that it was understood and agreed that all terms and conditions of the October 1, 1937, partnership agreement should remain in full force and effect except as to the change of percentage of ownership occasioned by such assignment. Also, without dispute and with Mr. Yoder's consent and agreement, the partnership so continued to operate thereafter under the partnership agreement until Mr. Yoder's death.

As far as important here, the October 1, 1937, partnership agreement, duly executed and acknowledged, provided in substance as follows: The name under which the partnership business was to be conducted was Munsell's Mineral Products Company, and it was to continue for an indefinite period. The partnership had power and authority to engage in the buying, selling, and dealing in minerals and allied products. It was agreed that they and each of the partners would be entitled to the net profits and be obligated to pay net losses in operation of the business of the company in the proportion their investments bear to the total investments of all the partners and that *"said proportions may be changed from time to time as the percentage of investment of each partner increases or decreases as herein agreed upon."* (Italics supplied.) The then agreed percentages of ownership by each of the five partners were stated as heretofore set forth.

It was agreed that control of the partnership should be vested at all times in those partners owning a majority of the investment in the company, provided, however, that management of the business might be entrusted to such person or persons as might be selected from time to time by those partners owning a

majority of the investment. Officers of the company were agreed to be a president, secretary, and treasurer, selected from among the partners, any two of which offices might be held by one person, and that such officers should perform the duties and have authority usually and customarily incident to those offices in partnership companies, but they should have such authority and perform such other duties as the partnership might from time to time determine. The partnership was given power and authority to select and employ a general manager who might or might not be one of the partners, and vacancies were to be filled by the same method as of elections of officers thereto for unexpired terms, but any officer or general manager might be removed by the vote of those partners owning a majority of the investment. Officers were required to be elected for 1 year and hold office until their successors were duly elected and qualified. Annual meetings of the partners were agreed to be held on the first Tuesday in February each year and any partner might vote by proxy. For the purpose of circumscribing and limiting the power of individual partners, it was agreed that no one or more partner had power or authority except by specific authority spread upon the minutes of the partnership and approved by the partners owning a majority in amount of the investment to do or perform any acts, among which was: "(d) To change or alter any written agreement of the partnership." Each of the parties agreed that he would not under any circumstances nor at any time state or represent that he was the owner of a greater share in the partnership than he actually had, or that the partnership had power or authority beyond that expressed in the partnership agreement, or that he or she as a partner had power and authority which had not been expressly conferred on them, or otherwise make any false representations concerning the power and authority of the partnership or the individual partners therein. It was agreed that

regular meetings of the partners could be held at such times as should be determined from time to time by the partners, and such meetings could be called at any time upon 7 days' notice mailed to each partner, or when ordered by the president and secretary.

It was agreed that distribution of the profits should be made at such times and in such amounts as should be determined from time to time by the partnership, and that same should be subject to control of a majority in amount of investment. Losses were agreed to be pro-rated among the partners according to the pro rata proportion of the investment and assessments made for any purpose should be based pro rata in proportion to the amount of the investment, and upon failure to pay same by any partner the partnership was given a lien for the amount thereof upon the share of such partner.

It was specifically agreed that upon death of any one of the partners, the business of the partnership would be technically dissolved and the surviving partners would be considered as trustees to carry out the partnership agreement and "*the surviving partners shall continue to operate the business as trustees upon the same terms and conditions as specified herein except for the absence of the deceased partner*" and that the business would be disposed of as follows: Within 10 days after the death of a partner, the surviving partners should call a special meeting and determine the market value of the deceased partner's share in the partnership and the survivors should have first option to purchase such share pro rata according to the respective shares on the basis of such appraised value, provided that those succeeding to the ownership of the deceased partner's share would be willing to sell such share upon the basis of such appraised value. (Italics supplied.) It was provided, however, that if those who succeeded to the share of the deceased partner should not elect to sell it at such appraised value, then within a reasonable time its value should be determined by the surviving part-

ners and the representative of the owner of the deceased partner's share, each selecting an appraiser and the two appraisers selecting a third, with survivors having an option to purchase said share by paying the amount of such appraisal. If the surviving partners should elect then not to purchase such share of the deceased, it was agreed that those who became owners thereof might be substituted as owner, subject to the limitations and conditions of the partnership agreement.

With regard to the matter of the appraisal by approved appraisers, we may assume that an unexecuted agreement to arbitrate will not ordinarily be recognized by the courts of this state because the effect thereof would be to oust the courts of their legitimate jurisdiction. See Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 92 N. W. 736. However that may be, such assumption will not avoid enforcement by courts of the valid provisions of the partnership agreement or affect the result under the circumstances presented herein.

In that connection, it was agreed in the partnership agreement that it should be binding on the parties thereto and their heirs, executors, administrators, personal representatives, devisees, legatees, next of kin, and upon all persons who succeeded to any right, title, or interest in or to the share of any of said partners, and should be binding upon successors in interest, guardians, and other persons, firms, or corporations succeeding to any right, title, or interest of any of the partners or the partnership, as provided in said agreement.

The guardian of Mrs. Yoder filed an answer claiming for her such interest in the premises as she was entitled to have; submitting her rights and interest to protection of the court; and praying for recovery of costs. Said guardian also filed a separate answer as guardian ad litem for Mrs. Yoder wherein he alleged that the action was for her ultimate benefit; claimed such interest in the premises for her as she was entitled to have; and prayed for recovery of costs. He also attended the

trial as guardian and as guardian ad litem, and was allowed $100 for services as guardian ad litem, which was taxed as costs to plaintiff. The other defendants filed an answer wherein they admitted that the parties had entered into a partnership agreement on or about October 1, 1937, as alleged by plaintiff; that Mr. Yoder and defendants, except Mrs. Hagen, continued to operate the business under said agreement until Mr. Yoder's death on November 6, 1953; and that Mrs. Hagen was not a partner on that date, she having assigned all of her right, title, and interest in the partnership to Mrs. Munsell on March 30, 1953. Mrs. Hagen prayed for dismissal of the action as to her at plaintiff's cost. The theory of defense for other surviving partners and the company was that after Mr. Yoder's death they allegedly continued to operate the business as provided in the partnership agreement; that within 10 days after November 6, 1953, the surviving partners called a special meeting and determined the market value of Mr. Yoder's interest to be $5,497.91 on November 6, 1953; that immediately on notice to Mrs. Yoder they exercised their option to purchase Mr. Yoder's share on the basis of such appraisal and offered to pay same to the legal representative of Mr. Yoder when appointed; that on or about March 22, 1954, Alta Yoder was appointed and qualified as executrix of the estate of Edwin Yoder, deceased; that after she was so appointed, and prior to March 31, 1954, she refused to sell Mr. Yoder's share for said appraised value and so notified defendants; that thereupon defendants demanded of Mrs. Yoder individually and as executrix to comply with the provisions of the partnership agreement and make selection of an appraiser, defendants having so selected one to determine the value of Mr. Yoder's share in the partnership so that surviving partners might exercise their option to purchase such share, but she refused to comply and notified defendants that as successor in interest and as executrix she would not be bound by any terms and

conditions of the partnership agreement; that thereafter, on or about April 15, 1954, defendants made a full, accurate, and complete accounting of all assets of every kind and character of the partnership; that same was then delivered to Mrs. Yoder as executrix by defendants who again offered to pay and tendered to her $5,497.91 for the share of Mr. Yoder, deceased, but she refused to accept same or be bound in any manner by the partnership agreement; that defendants kept the tender of such sum good; and that on or about February 23, 1956, defendants delivered such tender to the county judge of Lancaster County to be held by him for the use and benefit of Mrs. Yoder as successor and legal representative of the estate of Edwin Yoder, deceased, which sum was later withdrawn by said representative without prejudice to any rights to recover more. Defendants alleged that by reason of the circumstances aforesaid, the 4-year statute of limitations began to run on March 31, 1954, and that plaintiff's cause of action was barred thereby.

With regard to the statute of limitations, it is well to point out here that admittedly in June 1954, defendants paid to the estate $1,415.49 as profits for 1953; that in January 1955, defendants paid to the estate $1,410.75 as profits for 1954; and that in February 1956, defendants paid to the estate $665.90 as profits for 1955. Thus, we do not deem it necessary to further discuss the statute of limitations except to say that we do not believe that it has barred plaintiff's action.

Defendants also alleged that they had fully and completely paid to the representative of Mr. Yoder's estate and to Mrs. Yoder as successor thereto, all of the right, title, and interest in and to defendant company which was due and owing thereon, and that because a complete accounting had already been had as requested by Mrs. Yoder as executrix and by plaintiff herein as administrator, plaintiff was not entitled to have an accounting and recover any additional sums. Defendants' prayer

was for judgment in favor of defendants and recovery of costs.

After a pretrial conference and an order thereon, a trial was had to the court whereat evidence was adduced by the parties and a judgment was rendered which found and adjudged the issues generally in favor of defendants and against plaintiff, with costs taxed to plaintiff, including an allowance of $100 for services of the guardian ad litem for Alta Yoder.

In that connection, the judgment found and adjudged that neither the sale by Mrs. Hagen of her interest in the partnership to Mrs. Munsell nor the death of Mr. Yoder nullified or destroyed the legal effect of the written partnership agreement as to the right of the surviving partners to continue the partnership business after Mrs. Hagen's withdrawal and after the death of Mr. Yoder, or as to their right to wind up partnership affairs according to the terms of said partnership agreement; that defendants have fully complied with the terms and conditions of said partnership in the manner and form as claimed by defendants; that as surviving partners they made a full, accurate, and complete accounting of the assets of the partnership as of November 6, 1953, the date of the death of Mr. Yoder; that they tendered to plaintiff through the county court the sum of $5,497.91, which sum had been determined by the surviving partners to be the amount of Mr. Yoder's share in the partnership on the date of his death; that same was paid to the estate without prejudice to any rights plaintiff might have to recover more; that thereafter plaintiff claimed that the estate was entitled to recover an additional amount for good will of the business, but that the evidence presented was insufficient to show that plaintiff was entitled to recover any sum whatever for his claim to good will; that the books, records, and accounts of defendant company were opened to an accounting by representatives of plaintiff, including a certified public accountant; that defendants have fully

complied with and supplied plaintiff with all the information requested or demanded by plaintiff in connection therewith; and that the evidence shows that the findings of defendants were true, accurate, and correct as to the amount of the assets of the partnership coming to the estate of Edwin Yoder, deceased.

Plaintiff's motions for new trial were overruled and he appealed, assigning in substance: (1) That the findings and decision were contrary to the law and evidence; (2) that the court erred in finding that the evidence was insufficient to show that plaintiff was entitled to recover any sum for good will; and (3) that the court erred in taxing as costs to plaintiff the fee of $100 for services of the guardian ad litem. We sustain the last assignment and dispose of it first.

In that connection, it is admitted that on March 22, 1954, letters testamentary were issued by the county court to Alta Yoder, widow of Edwin Yoder, as executrix of his estate. She admittedly served until September 11, 1956, when she became mentally incompetent, and Mark A. Buchholz was appointed and qualified as her guardian. On April 10, 1957, Mrs. Yoder was discharged as executrix and plaintiff herein was appointed and qualified as administrator de bonis non of the estate of Edwin Yoder, deceased, and has acted in that capacity ever since. He has not refused to bring this action but has done so in such capacity, and no charge is made that he was guilty of fraud, misrepresentation, or dereliction as such. Section 30-301, R. R. S. 1943, provides: "The word 'executor,' as used herein, shall be construed to include an administrator with the will annexed."

This court held in Prusa v. Everett, on rehearing, 78 Neb. 251, 113 N. W. 571: "The term 'administrator de bonis non,' used in reference to the administration of estates by the courts of this state, means an administrator who has been appointed in the place of a former ad-

ministrator or executor who has ceased to be such after partial administration of the estate.

"The administrator de bonis non has all the powers of his predecessor, and may sue to recover funds in the hands of agents employed by his predecessor."

In Minahan v. Waldo, 161 Neb. 78, 71 N. W. 2d 723, we held that: "The representative of an estate is authorized to and should prosecute an action if he in good faith believes it is necessary for the recovery of a debt owing the estate." See, also, § 30-803, R. R. S. 1943. Also, section 38-502, R. R. S. 1943, authorized the guardian of Mrs. Yoder to sue for and appear for her in legal suits and proceedings unless where another person is appointed for that purpose as a guardian or next friend.

Section 25-317, R. R. S. 1943, provides that: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

Neither Mrs. Yoder's guardian nor her guardian ad litem had or claimed any interest adverse to plaintiff, but rather as defendants joined with plaintiff seeking like relief. Alta Yoder was not a necessary party to a complete determination or settlement of the questions involved, and she required no appointment of a guardian ad litem. We may assume, for argument only, that plaintiff and the guardian were united in interest within the provisions of section 25-318, R. R. S. 1943. In that connection, plaintiff had power and authority to represent the estate of Edwin Yoder, deceased, of which Mrs. Yoder, incompetent, was sole beneficiary, and her guardian likewise had power and authority to sue for and appear for her in legal suits and proceedings. There being no necessity for the appointment of a guardian ad litem, and since defendants requested such appointment, and services as guardian ad litem were performed as requested, the $100 fee allowed by the court for such

services should have been and hereby is ordered taxed as costs to defendants.

We have consistently held that: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." Wiskocil v. Kliment, 155 Neb. 103, 50 N. W. 2d 786.

In the light thereof and other rules hereinafter mentioned, we have examined the evidence. The business of defendants, Munsell's Mineral Products Company, was originally organized and established in June 1920 by the husband of Mrs. Munsell and father of other originally named defendants, but the company was not then a partnership. The husband and father died June 8, 1928, and the company has continued operations since that time. Mr. Yoder, who was totally blind at all times, became associated with defendant company as an employee in 1925. He started as a stenographer and at times took care of affairs of the company while others interested therein were absent from the company office. When Mr. Munsell died, he left Mr. Yoder 10 shares in the company, and Mr. Yoder thereafter acquired a few more by gift or payment of little consideration therefor. The nature of the company's business was purchasing at wholesale and repacking, advertising, distributing, and selling food tablet supplements consisting of minerals and vitamins to retail dealers. The company had no sales agents as such, but distributed and sold such products to independent dealers who sold at retail in 8 or 10 states. The company's principal place of business was always in Lincoln, Nebraska. On October 1, 1937, defendants and Edwin Yoder entered into the partnership agreement heretofore set forth, and the business was carried on thereunder by them with

Mr. Yoder holding a 17.26 percent interest in the partnership until June 24, 1946, when Mrs. Munsell assigned a 7.74 percent interest to him, thus giving him a 25 percent interest, which was done by a witnessed agreement in writing that the October 1, 1937, partnership agreement should remain in full force and effect except as to such change of percentage of ownership. Thus, the business was carried on until March 30, 1953, when Mrs. Hagen assigned her 12.22 percent interest in the partnership as a gift to her mother, Mrs. Munsell, who on June 12, 1953, as importuned by Edwin Yoder, assigned 12½ percent of her interest in the partnership to Mr. Yoder for life, with the remainder to Mrs. Munsell, which was done by a witnessed agreement in writing that the October 1, 1937, partnership agreement should remain in full force and effect except as to such change of percentage of ownership, and the business then continued to so operate with Mr. Yoder's acquiescence, consent, and profit until his death on November 6, 1953.

Contrary to plaintiff's contention, such assignments did not under the circumstances presented herein ipso facto dissolve the partnership and free the partners from the terms and conditions of the partnership agreement. As stated in 68 C. J. S., Partnership, § 346, p. 852: "A sale, conveyance, transfer, or assignment by a partner of his interest in the partnership or in the partnership property to a copartner * * * does not of itself dissolve the partnership, although the entire circumstances connected with such a transfer may be sufficient to bring about its dissolution. * * * a partner's conveyance of his interest in the partnership property to a copartner operates as a dissolution of the partnership only when it is clear that the parties contemplated and intended the entire withdrawal from the partnership of such partner and the termination of the partnership as between themselves." In other words, the effect to be given such conveyance by one partner to another partner is primarily a question of intention or agree-

ment by the parties herein, made clear in the manner heretofore set forth in both the original partnership agreement and in the written assignments. See, also, 40 Am. Jur., Partnership, § 244, p. 299, and authorities cited.

Prior to the death of Edwin Yoder and thereafter, Mrs. Munsell was the president and head of defendant company, and had received a salary as such. Mr. Yoder had also received a salary for his services as secretary or office manager and stenographer but no other partners were paid any salary before the death of Mr. Yoder because they did not actively participate in the business. In 1954 and thereafter, Mrs. Munsell was paid a salary as was Mrs. Lindeman because she performed the services theretofore performed by Mr. Yoder, and Don, a physician, was paid a salary of $50 a month in 1956 for serving as a medical and business advisor. After November 6, 1953, the business continued in conformity with the partnership agreement, and such salaries were fixed by the surviving partners who owned a majority of the investment.

On October 31, 1953, before Mr. Yoder's death, the partners made a full and complete statement and accounting of the assets of defendant company. Following Mr. Yoder's death and funeral, the surviving partners met in conformity with the partnership agreement and admittedly again made a full, complete, and correct accounting of the assets of the company and determined that Mr. Yoder's percentage share had a market value of $5,497.91. However, such amount did not include anything for good will because the company's books and records never carried it as an asset and it had never been considered or treated as an asset in any purchase of shares or transactions between the partners or otherwise. It is admitted that $5,497.91 was the correct value of Mr. Yoder's interest if plaintiff was not entitled to recover anything for good will. Complete records had always been kept of each partner's percentage of ownership,

based on book value, together with profits paid based thereon, and the salaries paid and received by them, if any, were reported regularly to each partner. Income tax returns also reported each partner's interest in the company, the profits paid to them, and salaries if any received by them.

Right after the surviving partners had valued the assets and receipts of the company and had determined the value of Mr. Yoder's interest therein on November 6, 1953, a statement thereof was given to Mrs. Yoder who made no objections at that time. Within 10 days after November 6, 1953, the surviving partners invited Mrs. Yoder and her then attorney to a meeting with them and such meeting was held whereat they were presented a statement of the company's assets and liabilities and the determination of the value of Mr. Yoder's interest. In the meantime, before Mrs. Yoder had been appointed executrix on March 22, 1954, several conferences were held with her concerning Mr. Yoder's interest in the company and the partnership agreement, and Mrs. Yoder was asked to cooperate but she was hostile to the partnership agreement and refused to recognize it. Soon after she was appointed executrix, she refused to accept defendants' tender of $5,497.91 for Mr. Yoder's interest and the surviving partners' offer to purchase his interest for that amount, but she demanded payment for good will. She also refused upon request to appoint an appraiser of such interest. Thereafter the company continued to operate the business as provided in the partnership agreement and the tender of such sum was kept good by defendants.

Admittedly, in June 1954, Edwin Yoder's estate was paid $1,415.49 by defendants as profits for 1953; in January 1955, it was so paid $1,410.75 as profits for 1954; and in February 1956, it was so paid $665.90 as profits for 1955, which made a total of $3,492.14 so paid to the estate. On February 23, 1956, defendants filed an application for an order in the estate proceedings of Edwin

Yoder's estate. Therein pertinent facts heretofore set forth were recited, and a financial statement as of November 6, 1953, and to date was attached, showing the previous determination of Mr. Yoder's interest by the surviving partners and payment of profits as heretofore recited. A bank draft for $5,497.91 was also then tendered, payable to Alta Yoder, executrix. The prayer of such application was for an order requiring Alta Yoder, executrix, to accept such sum for Mr. Yoder's interest in the company so that defendants might be released of all claims and liabilities arising between the partnership and the representative of Edwin Yoder, deceased. The total amount thus paid to the estate was shown to be $8,990.05.

Thereafter, on March 28, 1956, defendants filed an amended application for an order in the estate of Edwin Yoder, deceased. Therein it was shown that Alta Yoder, as executrix, was willing to accept and receipt for $6,163.81, without prejudice, which sum in fact included the $5,497.91 interest of Mr. Yoder and profits of $665.90 paid to the estate in February 1956, which still remained in said estate. Defendants' application indicated that they were willing for her to accept and receipt for such sum without prejudice to any right she might have to sue to recover any additional amount she claimed to be due. Accordingly, defendants' amended application prayed that the $6,163.81 be paid over to Alta Yoder as executrix with instructions that receipt thereof by her would be without prejudice as aforesaid, and that upon such payment an order be entered permitting defendants to withdraw their original application. That was done, and on April 18, 1956, defendants filed a dismissal of their original application reciting again that it was done without prejudice to any proceedings which Alta Yoder, executrix, might decide to file if she claimed additional money due. She did not ever file any such proceedings although she served as executrix until September 11, 1956, when she was

found incompetent and her guardian was appointed. Thereafter, on April 10, 1957, she was discharged as executrix and plaintiff was appointed and qualified as administrator de bonis non of the estate of Edwin Yoder, deceased, and on June 21, 1958, such administrator brought this action.

The books and records of the company were always made available to Mrs. Yoder individually and as executrix, and to her certified public accountant. He made an original accounting of the company's assets prior to December 29, 1953, but after Mr. Yoder's death, and found that the books and records had been kept correctly and in a true and accurate manner, and that the amount determined and set apart to pay the representatives of Edwin Yoder for his interest was correct except for good will, if any. After plaintiff's appointment and at request of his attorney another certified public accountant who had been previously associated with the accountant who had examined defendants' records and reported thereon prior to December 29, 1953, examined briefly defendants' books and records, including all income tax returns of the company appearing as evidence in this record and figures obtained by him through the first accounting aforesaid. Plaintiff's accountant did not at any time make a technical audit of defendants' books or trace any items to their source. He testified as an expert witness for plaintiff that defendants' income tax returns correctly reflected records of the company; that the company's books and records were correct and complete in accord with standard accounting practices, with one exception unimportant here; that defendants cooperated fully and made all their records available to him; that $5,497.91 correctly reflected Mr. Yoder's interest in the company on November 6, 1953, except for good will, which was not reflected in the books and records; and that such would not ordinarily be done unless there was good will and it had been purchased as such, which in fact had never been done by any of

the parties. Such witness defined good will as the ability of a business to continue to earn a normal rate of return on assets invested in the business. Based upon a hypothetical theory and some assumptions, he testified that defendants' business had a good will value and that the value thereof was $12,000 which it appears was more than one-half the admitted book value of the company's assets on November 6, 1953. In that situation, Edwin Yoder's estate would be entitled to 25 percent or $3,000, which it appears was more than one-half the admitted book value of Edwin Yoder's interest in the company on November 6, 1953. In fixing such amounts, the witness took into account that defendants were engaged in an unstable or rather unstable and highly specialized business. However, he did not inquire or know whether defendants' business would continue, but assumed that it would. He did not consider or know what, if anything, the shares in the company would sell for on the market, and he knew of no sales with which he could make a comparison. In fixing such value of good will, he did not ascertain or consider what the effect of Mr. Yoder's death would have upon assumed continuation of the partnership business. In that connection he had never had any previous experience with a partnership where one of the partners had died. He once had an experience with a somewhat similar business but it was with a corporation which was admittedly different. He took no account of the expectancy of defendant company's president, Mrs. Munsell, or that operation of the business had to be conducted by someone familiar with the Pure Food and Drug Act and with legislation in states where defendants did business with independent dealers as distinguished from agents, and he did not know or consider that defendants' business had competition and was having a difficult time staying in operation but was losing business at times caused by state statutory regulation and interference by bureaus of health, medical, and pharmaceutical associations. In

that connection, we recently reaffirmed in Gotfrey v. Sakurada, 169 Neb. 879, 101 N. W. 2d 470, that: "The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true."

On the other hand, there is competent evidence that the company's books and records never had carried good will as an asset; that the partners never considered or treated it as an asset in any purchase of shares or transactions whatever between the parties or otherwise; and that some of Edwin Yoder's shares were purchased at a low price or were actually given to him. Also, there is competent evidence that defendants were engaged in a ticklish, highly speculative, and unstable business which was worthless on the market and had no good will value but that the entire value of Mr. Yoder's interest at the time of his death was $5,497.91. Viewed in such light, the evidence with relation to good will claimed by plaintiff was conflicting to say the least, and we will not disturb the trial court's findings and judgment.

Also, as concluded in Matter of Brown, 242 N. Y. 1, 150 N. E. 581, 44 A. L. R. 510, citing authorities, partners may contract that good will shall not be considered as an asset of the copartnership, and such contract may arise by implication from other contracts and the acts and conduct of the parties, and an inference that there was to be no accounting for good will or dissolution of a partnership may be drawn from the fact that no notice was taken of it as an asset when new members were admitted to the firm or old ones went out.

In that connection, as early as Lobeck v. Lee-Clarke-Andreesen Hardware Co., 37 Neb. 158, 55 N. W. 650, 23 L. R. A. 795, this court held that: "Upon the dissolution of a partnership firm by the death of one of its members, the surviving partners may carry on the same line of business at the same place as was transacted the firm business, without liability to account to the legal

representative of the deceased partner for the good-will of said firm, in the absence of their own agreement to the contrary." See, also, 40 Am. Jur., Partnership, § 307, p. 343.

In the case at bar there is a specific valid contractual provision that in case of the death of any partner, the partnership shall be only technically dissolved and the surviving partners shall continue to operate the business with first option to purchase the deceased partner's interest in the partnership, and said agreement contains no provision that the surviving partners shall be liable to account for good will. Further, as stated in 40 Am. Jur., Partnership, § 270, p. 315, citing authorities: "Of course, in particular instances it may appear that the good will of a firm is without value. Where this is shown to be the case there is no necessity for accounting for it. Furthermore, the partners may contract that the good will of the firm is not to be considered as an asset in winding up its affairs, or that, on the withdrawal of a member, it is to go to the remaining members without any accounting for it. An agreement to this effect, express or implied, will be enforced." Cases relied upon by plaintiff are distinguishable on the facts and the law.

At conclusion of plaintiff's evidence he elected to take the profits of the company from November 6, 1953, through the date the amounts due are paid to plaintiff, in lieu of interest on the alleged capital contribution of Mr. Yoder to the partnership, from November 6, 1953, to the date the amounts due are paid, and plaintiff was given permission to so amend his petition by interlineation. The difficulty with that election and contention is evident from the following: The estate was regularly paid Mr. Yoder's proportionate share of the profits for 1953, 1954, and 1955, and soon after the last payment thereof was made in February 1956, defendants paid Edwin Yoder's capital contribution of $5,497.91 to the estate, whereupon Alta Yoder as executrix accepted

and receipted for all such funds without prejudice, as heretofore stated. Thus Mr. Yoder's capital contribution or interest in the partnership was no longer available thereafter to the surviving partners for the production of either interest or profits, and defendants would not be liable for interest thereon or profits in lieu thereof upon any theory after 1955. On the other hand, plaintiff argued that none of the surviving partners were entitled to any compensation for their services after the death of Mr. Yoder. Therefore, plaintiff would be entitled to larger profits than were paid. We do not agree. The general rule is that: "In the absence of an agreement therefor, or of special circumstances, a surviving partner is not ordinarily entitled to compensation for his services in winding up and settling the partnership affairs." 40 Am. Jur., Partnership, § 313, p. 347. Herein there was an agreement that the business should continue after the death of a partner and there would have been no profits which plaintiff elected to receive unless the surviving partners had continued the business as agreed. A surviving partner is ordinarily entitled to compensation for his services out of profits earned by the deceased partner's capital which he continues to use in the business with consent of the representative of deceased, and even if without consent of the representative of the deceased partner the surviving partner so continues the business at his own risk and makes a profit, the estate is bound to allow reasonable compensation for his services if it elects to share in the gains or profits so made. See 40 Am. Jur., Partnership, § 314, p. 348.

Finally, we conclude that the trial court properly found that the death of Edwin Yoder neither nullified nor destroyed the legal effect of the written partnership agreement of October 1, 1937, with regard to the rights of the partners to "continue to operate the business as trustees upon the same terms and conditions as specified" in the original partnership agreement "except

for the absence of the deceased partner, * * *."

In that connection, section 67-304, R. R. S. 1943, of the Uniform Partnership Act, which became effective August 29, 1943, long after the partnership contract here involved was executed, specifically provides that: "This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to effect (affect) any action or proceedings begun or right accrued before this act takes effect."

For reasons heretofore given, we conclude that the judgment of the trial court should be and hereby is affirmed except as modified with respect to taxation of a guardian ad litem fee to plaintiff, which should have been taxed as costs to defendants. All costs in this court are taxed to plaintiff.

AFFIRMED AS MODIFIED.

DORLIN E. LOCKMON, APPELLANT, V. STEPHEN A. REED, APPELLEE.

104 N. W. 2d 269

Filed July 15, 1960. No. 34782.

1. **Automobiles: Highways.** A left turn across a public highway between intersections is inherently dangerous and one making such a movement is required to exercise a degree of care commensurate with the danger.
2. ———: ———. The giving of the statutory signal for a left turn in such a case will not absolve the driver from a charge of negligence when he fails to exercise ordinary care for his own safety and that of others by looking to the front and rear for the approach of other vehicles using the highway.
3. ———: ———. Where a driver in such a case gives the statutory signal for a left turn and relies upon the report of others in a position to see that the movement is safe, the question of the driver's negligence is ordinarily one for the jury.

APPEAL from the district court for Madison County: FAY H. POLLOCK, JUDGE. *Affirmed.*

Bernard A. Ptak, for appellant.

Daniel D. Jewell, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for damages for personal injuries and property damage resulting from the collision of two motor vehicles. The jury returned a verdict for the defendant on plaintiff's petition and for the plaintiff on defendant's cross-petition. The plaintiff has appealed.

The plaintiff's evidence shows that on July 17, 1954, at 6 p.m., he was driving east on U. S. Highway No. 275, an east-west road between Tilden and Norfolk. The highway was an oil-mat surfaced road about 21 feet wide. The day was clear and the road was dry. The accident occurred about 1½ miles west of the Battle Creek spur, at which point the road was straight and level with good visibility for 2 miles east and west of the point of the accident. Plaintiff testified that he was driving east on the right-hand side of the road at a speed of 60 miles an hour when he observed defendant's truck proceeding east ahead of him. The truck was towing a two-wheel trailer on which was mounted a tar pot used in heating asphalt for use in roof repairing. When he was 200 or 250 yards from the truck he pulled to his left and looked for oncoming traffic. Seeing no oncoming traffic he pulled into the north lane to pass, at which time he observed that the truck was slowing down. When he was 200 feet west of the truck he let up on the accelerator and applied his brakes. The truck at that time made a left turn across the highway for the purpose of entering a private lane going north. He testified that he collided with the left rear wheels and truck box of the truck, suffering the damages of which he complains.

Plaintiff testified that he sounded his horn before

starting to pass, in accordance with his custom, although he has no recollection of doing so. He said he saw no signal for a left turn by the driver of the truck. He testified that the accident occurred on the north half of the highway and that he left tire marks on the pavement for 150 feet preceding the point of collision.

Defendant's evidence is that he was the owner of the truck which he used in his roofing business. It was being driven by Paul Zimmerman at the time of the accident. William Viergutz and Gerald Fix were riding in the truck with Zimmerman. Viergutz sat on the right side of the seat and Fix was in the middle. All were employees of the defendant whose place of business was in Norfolk.

The occupants of the truck testified that they had been doing roof repairing in Tilden on the day of the accident. On their way home they were to repair a cabin roof a short distance north on the private road they were entering at the time of the accident. The evidence shows that prior to the accident they were driving east on the highway at 45 miles an hour. The driver of the truck observed the private lane when he was one-fourth mile west of its entrance. There was no rear view mirror on the truck and vision to the rear through the glass in the back of the cab was obstructed by materials being carried in the truck. At a point 300 to 400 feet west of the entrance to the lane Viergutz got out on the running board of the truck, looked to the rear, and reported the "coast was clear" to the driver. When the truck was 100 feet west of the entrance to the lane, Viergutz again got out on the running board and looked to the rear. He again reported to the driver that the "coast was clear." The driver of the truck testified that he gave a hand-and-arm left-turn signal at a distance of 150 feet from the entrance to the lane. He testified that he slowed the truck to 10 or 15 miles an hour before making the turn and was moving at 5 miles an hour when the collision occurred. The witness Fix

testified that he saw Zimmerman give the left-turn signal.

The three occupants of the truck testified that they did not see plaintiff's car prior to the collision and that they heard no horn signal of plaintiff's intention to pass.

The evidence further shows that the body of the truck extended 10 to 18 inches beyond the cab. It shows also that the truck was pushed 9 feet to the northeast by the force of the impact. The state patrolman who investigated the accident testified that plaintiff told him he was driving 65 miles an hour when the accident occurred. The patrolman also testified that the tire marks on the pavement made by plaintiff's car indicated that 2 wheels were braking for the first 50 feet and that all 4 wheels left their marks on the pavement for the last 100 feet. It was on this statement of facts that the jury returned a verdict against both parties to the action.

The plaintiff makes the following assignments of error: (1) The court erred in refusing to direct a verdict against the defendant on his cross-petition, and (2) the court erred in giving instructions Nos. 4, 9, 13, 16, 17, and 18.

On the first assignment the plaintiff contends that where speed was not a factor in or a contributing cause of the accident it is neither contributory negligence nor a proximate cause of the accident. As a general proposition of law we find no fault with this statement of the law but it has no application here. The evidence shows that plaintiff observed the truck slowing down for some distance before the left turn was made. There is no satisfactory evidence that he sounded a warning of his intention to pass. There is evidence that he was exceeding the statutory speed limit of 60 miles an hour. It was clearly a question for the jury to determine whether or not the plaintiff exercised due care under all the facts and circumstances shown.

Plaintiff asserts that a directed verdict should have

been granted against the defendant on his cross-petition on the authority of Kruger v. Ervin Clark Constr. Co., 166 Neb. 252, 88 N. W. 2d 778, and Petersen v. Schneider, 153 Neb. 815, 46 N. W. 2d 355. The effect of these holdings is that the giving of a statutory signal for a left turn will not absolve the driver from negligence where he fails to exercise care for his own safety, and that of others, by looking to the front and rear for the approach of other vehicles using the highway. The evidence in the present case which the jury could properly consider shows that the driver of the truck did more than give a hand-and-arm signal of his intention to turn left. The occupants of the truck testified to the fact that Viergutz twice got out on the running board and looked to the rear for approaching vehicles at appropriate times. Both times he reported to the driver that it was safe to make the contemplated left turn. Whether or not defendant's driver was negligent under such circumstances is clearly a jury question to be determined from all the facts and circumstances. The trial court was clearly correct in submitting the issues of negligence and contributory negligence to the jury.

The plaintiff complains of the giving of the instructions hereinbefore specified. These instructions had to do with the submission of the issues presented by defendant's cross-petition and the submission of the contributory negligence of the plaintiff to the jury, and, necessarily, the submission of the comparative negligence rule. We have examined these instructions and they are in all respects correct. It seems to be the contention of the plaintiff that they were erroneously given because the defendant's driver was guilty of negligence as a matter of law. But having determined this question adversely to plaintiff on the motion for a directed verdict, the instructions were necessary and proper under the issues presented. In other words, the validity of all the assignments of error were dependent upon a holding that plaintiff's motion for a directed verdict on de-

fendant's cross-petition was erroneously overruled. Our determination of that issue adversely to the plaintiff disposes of the appeal under the assignments of error made.

We find the record to be free from error and the judgment of the district court is affirmed.

AFFIRMED.

LINCOLN DAIRY COMPANY, A CORPORATION, ET AL., APPELLANTS, V. PEARLE F. FINIGAN, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE AND INSPECTION OF THE STATE OF NEBRASKA, ET AL., APPELLEES.
104 N. W. 2d 227

Filed July 15, 1960. No. 34794.

1. **Constitutional Law: Statutes.** The Legislature may not lawfully delegate legislative powers to an administrative or executive authority.
2. ———: ———. The exercise of a legislatively-delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations and standards, is not an exercise of legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended.
3. ———: ———. The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated. They may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available.
4. **Criminal Law.** In this state all public offenses are statutory, and no person can be punished for any act or omission which is not made penal by the plain import of a properly enacted statute.
5. **Constitutional Law: Statutes.** The Legislature cannot delegate its power to create criminal offenses and prescribe penalties to an administrative or executive authority. Such powers are exclusively legislative and may not be delegated to the executive branch of government under the doctrine of the division of powers contained in the state Constitution.

6. ———: ———. The grant of power by the Legislature to the Director of the Department of Agriculture and Inspection to promulgate rules and regulations in general compliance with a model code, in accordance with his judgment or whim, the violation of which are made crimes subject to punishment, is an unconstitutional delegation of legislative power to an administrative authority.
7. **Constitutional Law: Criminal Law.** The public has a right to know the acts which constitute crimes in this state and the punishments provided therefor. To hold otherwise would in effect deprive the people of personal and property rights for which constitutions were devised to protect.
8. **Constitutional Law: Statutes.** A citizen has the constitutional right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature under the police power to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends.
9. ———: ———. Where it appears that a statute, under the guise of police regulation, does not tend to preserve the public health, safety, and welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an unwarranted interference with or an encroachment upon the property rights of the individual.
10. ———: ———. The Legislature has the power to prohibit the sale of food products that are dangerous or harmful to public health but it cannot prohibit the sale of a wholesome and nutritious food product that is not a fraud upon the public.
11. ———: ———. Sections 81-263.01 to 81-263.10, R. R. S. 1943, and section 81-263.06, R. S. Supp., 1959, are unconstitutional and void because they are violative of Article I, section 3, Article II, section 1, and Article III, section 1, Constitution of Nebraska, (1) in that they contain an unlawful delegation of legislative power to an administrative officer, (2) in that the delegation of power is unlawful as it is described in indefinite, obscure, and vague generalities based on extrinsic evidence not readily available, and (3) in that they prohibit the sale of food products which are wholesome, nutritious, and harmless, and not a fraud upon the public.

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. *Reversed and remanded.*

Ginsburg, Rosenberg & Ginsburg, Norman Krivosha, and *W. O. Baldwin,* for appellants.

Clarence S. Beck, Attorney General, and *John E. Wenstrand,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action for a declaratory judgment to test the constitutionality of sections 81-263.01 to 81-263.10, R. R. S. 1943, and section 81-263.06, R. S. Supp., 1959, which will hereafter be referred to as the Grade A Milk Act. The defendants demurred to plaintiffs' petition which the trial court sustained. Plaintiffs refused to plead further and stood on their petition. The trial court thereupon dismissed plaintiffs' petition. Plaintiffs have appealed.

The plaintiffs are engaged in the business of owning and operating milk processing plants in Lincoln, Hebron, and Deshler, Nebraska. The defendant Finigan is the Director of the Department of Agriculture and Inspection of the State of Nebraska, and charged with the duty of prescribing regulations for the production, processing, and sale of Grade A milk and milk products, and of enforcing the statutes and regulations adopted pursuant thereto. The defendant Flagg is the Chief of the Bureau of Dairies, Foods and Drugs in such department and is in direct charge of the supervising and enforcing of such statutes and regulations. The defendant Grade A Milk Advisory Board of the State of Nebraska was created under section 81-263.03, R. R. S. 1943, and is advisory to the Director of the Department of Agriculture and Inspection in the promulgation of regulations and the enforcement thereof.

It is the contention of the plaintiffs that section 81-263.02, R. R. S. 1943, of the act contains an unlawful delegation of legislative power to the Director of the Department of Agriculture and Inspection in that it violates Article II, section 1, and Article III, section 1, of the Constitution of Nebraska. Section 81-263.02, R. R. S.

1943, provides: "The director is hereby authorized to adopt, by regulation, minimum standards for the sanitary quality, production, processing, distribution, and sale of Grade A milk and Grade A milk products, and for labeling of the same. Such regulations shall comply generally with the Milk Ordinance and Code—1953 recommendations of the Public Health Service, of the Department of Health, Education and Welfare of the United States."

Section 81-263.10, R. R. S. 1943, provides in part: "Any person or persons violating the provisions of sections 81-263.01 to 81-263.10 or the rules and regulations issued thereunder, * * * shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than one hundred dollars for the first violation, and not less than one hundred dollars nor more than five hundred dollars for a subsequent violation."

It is fundamental that the Legislature may not delegate legislative power to an administrative or executive authority. Smithberger v. Banning, 129 Neb. 651, 262 N. W. 492, 100 A. L. R. 686. The Legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations. Such authority is administrative in its nature and its use by administrative officers is essential to the complete exercise of the powers of all departments. State ex rel. Martin v. Howard, 96 Neb. 278, 147 N. W. 689. It is fundamental, also, that in the legislative grant of power to an administrative agency such power must be limited to the expressed legislative purpose and administered in accordance with standards prescribed in the legislative act. The rule was stated by this court in Board of Regents v. County of Lancaster, 154 Neb. 398, 48 N. W. 2d 221, in the following language: "The exercise of a legislatively-delegated authority to make

rules to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations, is not an exclusive legislative power. It is administrative in its nature and its use by administrative agencies is usually essential to the complete and wise exercise of the power in the accomplishment of the purpose which the Legislature intended. Consequently, the courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred."

The limitations of the power granted and the standards by which the granted powers are to be administered must, however, be clearly and definitely stated in the authorizing act. The plaintiffs contend that these requirements have not been met in the present act and that they therefore violate constitutional prohibitions.

The act authorizes the director to adopt, by regulation, minimum standards for the sanitary quality, production, processing, distribution, and sale of Grade A milk and Grade A milk products, and for the labeling of the same. No limitation is placed upon the power of the director or the standards by which such granted power is to be exercised except that they are to comply generally with the Milk Ordinance and Code—1953 recommendations of the Public Health Service of the Department of Health, Education and Welfare of the United States. It will be observed that the ordinance and code referred to are recommendations only. They constitute a suggested model to be used in making regulations for the production and sale of Grade A milk and other grades as well. They have not been promulgated or published as regulations by any department of the United States government. They are not required to be filed in any public office or registry and their content can be established only by extrinsic evidence since this court cannot take

judicial notice of their existence or what they may contain.

It will be noted also that section 81-263.10, R. R. S. 1943, provides criminal penalties for violation of the Grade A Milk Act and the regulations promulgated by the director. The validity of the regulations is dependent upon proof by extrinsic evidence, which is uncertain as to status and not readily available. Their validity cannot be ascertained from the authorizing statute. Criminal prosecution cannot be grounded on such nebulous definitions of crime. All crimes are statutory in this state. The validity of a statute purporting to define a crime cannot be based on such an indefinite, uncertain, and obscure basis of validity as is presented by the statute before us.

In Lane v. State, 120 Neb. 302, 232 N. W. 96, this court said: "In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law." In State v. De Wolfe, 67 Neb. 321, 93 N. W. 746, the court said: "In this state all public offenses are statutory, and no person can be punished for any act or omission not made penal by the plain import of the written law." See, also, State v. Pielsticker, 118 Neb. 419, 225 N. W. 51.

The Legislature purported to grant authority to the director to make regulations which comply generally with the described milk ordinance and code, and provided that a violation of such regulations constituted a criminal offense with a fixed penalty. The director was thereby empowered to arbitrarily promulgate any regulations he saw fit if they complied generally with the milk ordinance and code. The effect is that the director was authorized to select any regulations he chose which were within the scope of the described model milk ordinance and code, the violation of which was to be a criminal offense. The attempt of the Legis-

lature to thus grant to the director the power to create criminal offenses violates all fundamental concepts relating to the delegation of legislative authority. By this statute the director and not the Legislature defines what shall be criminal offenses. It is axiomatic that the power to define crimes and criminal offenses is in the Legislature and it may not delegate such power to an administrative agency.

In Smithberger v. Banning, *supra,* we cited the following with approval from the case of Darweger v. Staats, 153 Misc. 522, 275 N. Y. S. 394: "The act adopts not a law of the congress, but a body of rules and regulations prepared by individuals, approved by an administrative authority and finally approved by the president, and then provides that, upon filing a certified copy in the office of the secretary of state, a violation of any provision of such Code so adopted and filed is a crime under the laws of the state of New York. To term such a method of legislation, such a manner of attempting to create criminal offenses, vicious is to indulge in mild criticism. To hold such a legislative act constitutional seems contrary to the plain language and import of our fundamental laws, both national and state."

In Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124, the United States Supreme Court in dealing with a similar situation said: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action." To uphold such a delegation of legislative power to an administrative officer or agency, as was attempted in the present case, would lead to far-reaching and dangerous consequences. Since regulations can be changed at

any time by the director, it is within his power to change or add to regulations previously promulgated, file them with the Secretary of State, and immediately they have the effect of law for a violation of which one may be punished criminally.

The public has a right to know what acts constitute crimes in this state and the punishments provided therefor. They may properly assume that crimes and punishment are purely a legislative function and that the definition of all crimes and the punishment therefor will be found in the duly enacted statutes of this state. The public may properly rely on the fact that the Legislature meets only at stated intervals and that criminal laws may be enacted, amended, and repealed only during such legislative sessions. For this court to hold that administrative or executive officers, or departments, could make rules and regulations from time to time according to judgment or whim, which would have the effect of law and the violation of which would be punishable as crimes, would be to deprive the people of the protection of the personal rights for which constitutions were devised to protect. The Grade A Milk Act is clearly unconstitutional in that it unlawfully delegates legislative powers to the Director of the Department of Agriculture and Inspection. The Legislature may not avoid by delegation the performance of its exclusive function to define crimes and provide the punishment therefor.

We do not hold that the Legislature may not adopt a law or regulation of another jurisdiction by reference. It may even adopt such except insofar as it is not in conflict with existing laws of this state. But it may not adopt by reference only to the extent that an administrative agency or officer shall see fit to adopt it. To so do is to delegate to the administrative agency or officer the determination of matters which are legislative and, consequently, for the determination of the Legislature.

The plaintiffs assert a second ground of unconstitutionality which deserves the attention of this court. Section 81-263.06, R. S. Supp., 1959, provides in part that after July 1, 1959, it shall be unlawful for any person owning or operating any milk plant to sell, offer, or expose for sale any milk or cream in any form or in combination unless it is labeled Grade A and produced and processed in conformity with the requirements of sections 81-263.01 to 81-263.10, R. R. S. 1943, and in compliance with the rules and regulations of the director promulgated in compliance with such sections.

The plaintiffs alleged in their petition that they have not complied with the foregoing statutes relating to Grade A milk and milk products and that they desire to continue to sell such products. They allege that the milk and milk products which they desire to sell, although not in compliance with Grade A statutes and regulations, are in all respects wholesome, pure, and fit for human consumption. They further assert that such milk and milk products are palatable, nutritious, and not deleterious to health, and are produced and processed in accordance with the general health and sanitary regulations contained in other statutes on the subject. These facts are admitted to be true by defendants' demurrer. It is contended that sections 81-263.01 to 81-263.10, R. R. S. 1943, and amendments thereto, unlawfully prohibit the processing and sale of milk and milk products that are healthful, wholesome, and nutritious, and that such statutes have the effect, if enforced, of using the police power of the state for the purpose of prohibiting the sale of one class of nutritious and wholesome food products in order to aid the sale of another class of similar food products.

A citizen clearly has the right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those

proposed ends. A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. The court has also consistently held that the regulation of legitimate business may not be so unreasonable as to result in the confiscation of property and the rights incidental to its ownership. This court cannot give judicial approval to legislation that violates these fundamental principles on any theory that they are permissible under Article I, section 3, of the Constitution of this state, commonly referred to as the due process clause.

The approval of such a provision, extended to other trade, would enable the Legislature to ban many common articles of commerce, such, for example, as syrup not all maple, shoes not all leather, clothes not all wool, and the like. The Legislature has no such power. Any attempt to accomplish such results is in violation of the constitutional right to engage in trade and business, secured by the due process clauses of the state and federal Constitutions.

In John F. Jelke Co. v. Emery, 193 Wis. 311, 214 N. W. 369, 53 A. L. R. 463, quoted with approval in Carolene Products Co. v. Banning, 131 Neb. 429, 268 N. W. 313, the court said: "It prohibits the carrying on of a legitimate, profitable industry and the sale of a healthful, nutritious food. This prohibition can only be justified upon the ground that it is necessary in order to protect the public health, public morals, public safety, prevent fraud, or promote the public welfare. As already indicated, the public health is not endangered by the manufacture and sale of oleomargarine and certainly no question of morals is involved. * * * Under the facts proven in this case, whatever the economics

of the situation may be, from the standpoint of constitutional right the legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in aid of the beef-cattle industry or to prohibit the manufacture and sale of cement for the benefit of the lumber industry. In some cases a proper exercise of the police power results in advantage to a particular class of citizens and to the disadvantage of others. When that is the principle purpose of the measure, courts will look behind even the declared intent of legislatures and relieve citizens against oppressive acts where the primary purpose is not the protection of the public health, safety, or morals."

The foregoing question was directly decided in Carolene Products Co. v. Banning, *supra,* wherein this court held: "The evils of which the state complains can undoubtedly be avoided by reasonable legislative regulation. The fixing of uniform standards in the sale of milk products will provide ample protection for the public. The legislature has the power to prohibit the sale of food products that are dangerous or poisonous but it cannot prohibit the sale of a wholesome and nutritious food product." See, also, Hall v. State, 100 Neb. 84, 158 N. W. 362, L. R. A. 1916F 136; State ex rel. English v. Ruback, 135 Neb. 335, 281 N. W. 607.

It is elementary that courts do not determine economic policies of legislation. The wisdom of such legislation is for the Legislature to determine. It is just as elementary, however, that in order for such legislation to be valid under the police power of the state it cannot be arbitrary or discriminatory, but must have a real and substantial relation to the objects sought to be attained. Courts are not powerless to determine the character of such legislation. The construction of statutes and the determination of their reasonableness is the ultimate province, responsibility, and duty of the courts and must be exercised by them if state and fed-

eral constitutional guarantees of liberty and property rights are not to be made subservient to pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry and detrimental to another under the guise of police power regulations. The preservation of constitutional guarantees against such invasions of constitutional rights is one of the foremost duties imposed upon the courts.

The power of the Legislature to prohibit the sale of dangerous products and to regulate the sale of legitimate products when the health, safety, and welfare of the public is involved is one thing. The prohibition of the sale of legitimate products, not involving the health, safety, or welfare of the public, in the present case wholesome and nutritious milk and milk products, involves quite another.

We do not purport to hold that the processing and sale of milk and milk products as a food is not subject to reasonable regulation under the police power. We do hold that the legislative right to regulate does not authorize the Legislature to prohibit the sale of a food product which is wholesome, nutritious, healthful, and fit for human consumption.

An exception to this general rule is the right of the state, under the police power, to enact laws which are designed to provide a minimum amount of nutritional elements and prevent fraud and deception upon the public. State v. McCosh, 134 Neb. 780, 279 N. W. 775. It is not here contended that the prevention of fraud upon the public plays any part in the present case.

Plaintiffs assert in their petition that since the adoption of the Grade A milk statutes, and the regulations promulgated pursuant thereto, the number of Grade A raw milk producers in the state has been reduced from 3,600 to 800, that this number will continue to decline if the act be enforced, and that plaintiffs will be forced to discontinue business if the enforcement of the act and regulations promulgated pursuant thereto

are not enjoined. It is asserted also that the regulations imposed are so unreasonable and require such an outlay in building and equipment costs that farmers cannot, or are unwilling to, continue the production of milk. In view of the conclusions we have reached we do not deem it necessary to pass upon the reasonableness of the regulations purported to have been promulgated; nor do we deem it necessary to pass upon the question of classification, or whether or not the regulations generally comply with the model code as directed by the act. Other issues are also raised which we likewise do not discuss in view of the conclusion reached.

We hold sections 81-263.01 to 81-263.10, R. R. S. 1943, and section 81-263.06, R. S. Supp., 1959, to be violative of Article I, section 3, Article II, section 1, and Article III, section 1, of the Constitution of Nebraska, and said acts are void and of no effect. The prayer of the plaintiffs for a permanent injunction should have been granted. The judgment of the district court is reversed and the cause remanded with directions to enter a judgment permanently enjoining the defendants from enforcing or attempting to enforce sections 81-263.01 to 81-263.10, R. R. S. 1943, and section 81-263.06, R. S. Supp., 1959, and the regulations of the Director of the Department of Agriculture and Inspection promulgated pursuant thereto. The costs of the action are taxed against the defendants.

REVERSED AND REMANDED.

WILLIS VONTRESS, APPELLEE, V. READY MIXED CONCRETE COMPANY, A CORPORATION, APPELLANT, IMPLEADED WITH PANE & COMPANY, INC., A CORPORATION, APPELLEE.
104 N. W. 2d 331

Filed July 15, 1960. No. 34801.

1. **Trial.** A party to an action is entitled to have the jury in-

structed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence, whether requested to do so or not.

2. ———. Where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court.

3. **Master and Servant.** The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts.

4. ———. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another person.

APPEAL from the district court for Douglas County: L. ROSS NEWKIRK, JUDGE. *Affirmed.*

Cassem, Tierney, Adams & Henatsch, for appellant.

Story, Pilcher & Howard and *E. H. Stevens*, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

WENKE, J.

This is an appeal from the district court for Douglas County. It involves an action brought by Willis Vontress against Ready Mixed Concrete Company, a corporation, for damages he suffered when one of defendant's cement mixer trucks was backed over his right foot. The jury returned a verdict for the plaintiff and defendant has perfected this appeal from the overruling of its motion for either a judgment notwithstanding the verdict or for a new trial.

Pane & Company, Inc., a corporation, plaintiff's employer, was made a party defendant to permit it to be reimbursed out of any recovery made by plaintiff for certain benefit payments it has made, or will make, under the provisions of the Nebraska workmen's com-

pensation laws because of the injuries plaintiff suffered. § 48-118, R. R. S. 1943.

For convenience we shall herein refer to appellant Ready Mixed Concrete Company as either appellant or Ready Mixed; to appellee Willis Vontress as either appellee or Vontress; to Robert F. Barnes, who was the driver of the cement mixer truck that backed over Vontress' right foot, as Barnes; and to Pane & Company, Inc., a corporation, as Pane.

Pane had entered into a contract to pave Oak Street in Omaha, Nebraska, at least between One Hundred Sixth and One Hundred Seventh Streets, and had entered into a contract with Ready Mixed to furnish concrete for the job. Pane had constructed forms on Oak Street, between One Hundred Sixth and One Hundred Seventh Streets, for that purpose and, on May 16, 1958, its employees, including Vontress, were engaged in finishing this part of the paving job, Ready Mixed furnishing the concrete, when the accident happened which resulted in Vontress' right foot being seriously injured.

Ready Mixed had a number of cement mixing machines stationed on trucks, to which we will herein refer as trucks. These trucks, loaded with mixed cement or wet concrete, would come to the intersection of Oak and One Hundred Eighth Streets, then back eastward on Oak Street to where the paving was being done, and there unload the concrete between the forms put up by Pane. One of these trucks, while being used to pull a strike-off bar, backed over Vontress' right foot. While the evidence as to how the accident happened is in conflict, it is sufficient to support a jury's finding that Barnes was negligent in backing the truck he was driving when he did and that his negligence, in doing so, was the proximate cause of the accident.

The principle question raised by this appeal is, is the evidence adduced sufficient to show, either as a matter of law or as an issue of fact for a jury, that Barnes was, at the time of the accident, a loaned or special employee

of Pane for the purpose of pulling the strick-off bar, and thus a fellow employee of Vontress, that issue having been properly raised by the amended answer of Ready Mixed and by its requested instructions? If he was, there can be no recovery by appellee herein under the factual situation disclosed by the evidence adduced. As stated in In re Estate of Bingaman, 155 Neb. 24, 50 N. W. 2d 523: "A person in the relationship of a fellow employee to another is not liable for negligent acts committed under the direction and control of the employer except for misfeasance or positive wrong."

By its instruction No. 6 the trial court, in effect, informed the jury that Barnes was not a loaned or special employee of Pane but was, in fact, at the time of the accident, acting within the scope and course of his employment by Ready Mixed and that Ready Mixed would be chargeable with and legally responsible for his negligence. The question of whether or not Barnes was, as a matter of fact, negligent in the operation of the truck he was driving and, if so, whether or not such negligence was a proximate cause of the accident was, by other instructions, properly submitted to the jury.

"A party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence, whether requested to do so or not." Southwell v. DeBoer, 163 Neb. 646, 80 N. W. 2d 877. See, also, Welstead v. Ryan Constr. Co., 160 Neb. 87, 69 N. W. 2d 308.

The factual situation herein presented as to the use by Pane of Ready Mixed truck drivers to pull the strike-off bar, if and when requested to do so, is not in dispute. We said in Mansfield v. Andrew Murphy & Son, 139 Neb. 793, 298 N. W. 749: "In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one rea-

sonable inference can be drawn therefrom, it is a question of law for the court." See, also, In re Estate of Bingaman, *supra;* Kessler v. Bates & Rogers Constr. Co., 155 Neb. 40, 50 N. W. 2d 553. In view thereof, the trial court was correct in passing on this issue as a matter of law. The question is, did it come to the correct conclusion?

It is of course true, as stated in Mansfield v. Andrew Murphy & Son, *supra,* that: "The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts." The court therein goes on to say: "The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another person." See, also, Kessler v. Bates & Rogers Constr. Co., *supra;* Standard Oil Co. v. Anderson, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480. As stated in Standard Oil Co. v. Anderson, *supra:* "One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation."

Vontress was an employee of Pane and, on May 16, 1958, he was working on the job of paving Oak Street. His duties on that job were to empty the cement from the trucks of Ready Mixed as they delivered it, doing so by means of a chute attached to the rear thereof, and to have one of the trucks pull the strike-off bar whenever it was necessary to have this done, asking the driver thereof to do so. Vontress had been engaged in doing this type of work for Pane for some 7 or 8 years. It is apparent that the drivers of these trucks had authority

from Ready Mixed to do this for Pane on this particular job whenever they were asked to perform it. In the performance of this work, both the unloading and pulling the strike-off bar, Vontress would signal the drivers of the trucks, there being only one driver to each truck, as to what he wanted them to do and they would operate the trucks they were driving accordingly.

The strike-off bar, which was owned by Pane, is a big thick piece of lumber made out of "4 by 12s." It is about 25 feet long, which was the width of the pavement, and is used to level off the concrete when it has been filled in between the forms used to contain it, being cut with a concave bow at the bottom in order to put a crown on the pavement of the street. It has roller coasters on each end, which rest on the forms located at each side of the pavement, to permit it to be moved back and forth. It has cables, about 50 feet long, which are attached to the bar by means of clevises, which cables have a hook at the other end to fasten to the truck. There is a vibrator attached to the top of the bar which vibrates the bar and thus helps to level off the cement as the bar is slowly moved forward over it. This bar belonged to Pane and was used by it in finishing the work of paving the street.

When the area between the forms had been completely filled for some distance, which usually took two truck loads of concrete, Vontress would ask the driver of the last truck emptied if he would pull the strike-off bar. The driver of that truck, whoever he might be, would then drive the truck to the center of the area between the forms and back up when Vontress signalled him to do so. The driver would back until signalled by Vontress to stop, which Vontress would do when the truck was far enough back so he could insert the hooks on the cables into openings in, or hooks attached to, the back end of the truck. When he had done so Vontress would signal the driver to go ahead, which he would do at about 1 mile an hour. When he

had gone far enough to level the area filled in with concrete Vontress would signal him to stop and then, after the cables had been released, the strike-off bar would be moved back and the process repeated as it was usually necessary to pull the strike-off bar twice to properly level the concrete. It was between the first and second pulling of the strike-off bar that Vontress was hurt when Barnes backed his truck while Vontress was in back of it releasing the cable.

There was no agreement, either oral or written, or any terms or arrangements between Pane and Ready Mixed whereby Pane was authorized to use the truck drivers of Ready Mixed for the purpose of pulling the strike-off bar with the trucks they were driving. It is apparent, however, that on this job Ready Mixed knew they were to be so used and gave its approval so the drivers could perform that service whenever they were asked to do so by Pane. It is apparent that doing so expedited the work, for the trucks were readily available to do it whereas, if Pane, on each occasion, had to move in the necessary power it would have delayed operations.

The case of Standard Oil Co. v. Anderson, *supra*, has been cited by this court as defining the various phases of relations in situations such as we have before us. Therein the court said: "It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become pro hac vice the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them.

In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking." The court therein goes on to state: "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters." See, also, Pappillo's Admx. v. Prairie, 105 Vt. 193, 164 A. 537.

Our cases of Mansfield v. Andrew Murphy & Son, *supra;* In re Estate of Bingaman, *supra;* and Kessler v. Bates & Rogers Constr. Co., *supra,* fall within the first classification, while the factual situation in the case itself falls in the second category, whereas the facts of this case bring it within the third, for here the services were rendered more in the nature of Pane and

Ready Mixed cooperating in coordinating the work to expedite its performance. As stated in Rice-Stix Dry Goods Co. v. Self, 20 Tenn. App. 498, 101 S. W. 2d 132, by quoting from 39 C. J., Master and Servant, § 1462, p. 1275: " 'To escape liability, the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under the control of a third person; and it is necessary to distinguish between authoritative direction and control and mere suggestions as to details or the necessary co-operation where the work furnished is part of a larger operation.' "

There is also merit to appellee's contention that the factual situation here presented brings it within the following principle stated in Shamburg v. Shamburg, 153 Neb. 495, 45 N. W. 2d 446, by quoting the following from Rhinelander Paper Co. v. Industrial Comm., 206 Wis. 215, 239 N. W. 412: " 'It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing what the new master directs him to do he is performing his duty to the employer who gave the order. * * * Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.' "

In view of the foregoing we have come to the conclusion that the trial court was correct in holding as it did, that is, that Barnes performed this service as an employee of Ready Mixed in cooperation with the em-

ployees of Pane and was not a loaned or special employee in the service of Pane.

Appellant also claims the court erred in sustaining objections to certain questions asked Vontress. Objections were made thereto on the basis that the questions called for conclusions of the witness rather than seeking to establish the facts as to what he did. They relate generally to the signals given by Vontress to Barnes to advise him as to the operations of his truck while it was being emptied of cement and used to pull the strike-off bar, but used the words "direction" and "control." The objections were properly sustained, for, in the form made, they did call for conclusions. But, even so, no prejudicial error could be based thereon if it could be said that the trial court erred in so ruling for all the information in regard thereto came in under proper questions or after appellant's counsel agreed as to what he meant by the use of the words "direction" or "control," that is, what signals he gave.

Appellant also complains of the fact that the trial court ruled out an offer of proof made by it after objections to a question asked Barnes had been sustained. The offer is as follows: "I offer to prove, if the witness were permitted to answer, that he would testify that the instructions are to pull the strike-off bar for them if they asked him to." Without discussing the merits of the trial court's ruling we hold the matter could not be prejudicial for it is apparent, from the record before us, that all the drivers of Ready Mixed working on this job had authority to do so whenever they were asked to perform this service by Pane. It was apparent that Ready Mixed was doing so in order to cooperate with Pane, thus coordinating the work to an expeditious conclusion.

AFFIRMED.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION, APPELLEE, V. HERBERT BODENSTEDT, DOING BUSINESS AS HERB'S BUICK COMPANY, APPELLANT.
104 N. W. 2d 292

Filed July 15, 1960. No. 34805.

1. **Trial: Judgments.** In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed.
2. ———: ———. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.
3. ———: ———. The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists.
4. **Names.** In the absence of statutory prohibition, a person, without abandoning his real name, may adopt or assume any name, wholly or partly different from his name, by which he may become known, and by which he may transact business, execute contracts, and carry on his affairs, unless he does so in order to defraud others, or he is inhibited by judicial adjudication, since it is the identity of the individual that is regarded, and not the name which he may bear or assume.
5. **Forgery.** Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.

APPEAL from the district court for Wayne County: LYLE E. JACKSON, JUDGE. *Reversed and remanded with directions.*

Addison & Addison, for appellant.

Kenneth M. Olds and *Donald R. Reed,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

YEAGER, J.

This is an action instituted by Fidelity and Deposit Company of Maryland, a corporation, plaintiff and appellee, against Herbert Bodenstedt, doing business as

Herb's Buick Company, defendant and appellant. Issues were joined by appropriate pleadings. Thereafter the plaintiff filed a motion for summary judgment in its favor. The defendant filed a motion in resistance and for summary judgment in his favor. The case came on for hearing before the court on the pleadings, the motions for summary judgment, and the respective supporting showings of the parties, at the conclusion of which a judgment was rendered in favor of plaintiff for $1,550 with interest in the amount of $68.98 and costs taxed at $17.95. From this judgment the defendant has appealed.

The substance of the cause of action pleaded by the plaintiff is that on or about July 24, 1958, a person who represented himself to be Fred C. Jarvis of Laurel, Nebraska, purchased from the defendant a 1956 Buick automobile for $1,550 plus carrying charges making a total of $1,761.60 to be paid in 23 installments of $65 each and 1 for $266.60; that at the time he executed a promissory note for the amount and a chattel mortgage to secure it, which were delivered to the defendant; that on or about the same day the defendant transferred the chattel mortgage and endorsed and delivered the note to the Triangle Finance Company; that the defendant warranted that the mortgage was a first lien upon the automobile; that by his endorsement and transfer of the note the defendant warranted it was genuine; that the Triangle Finance Company believed that the note was true and genuine and was signed by Fred C. Jarvis; that for the note the Triangle Finance Company paid defendant $1,550; that the note was not executed by Fred C. Jarvis but by a grandson of Fred C. Jarvis; that the note was a forgery; and that no payment was made in consequence of which the Triangle Finance Company sustained a loss in the amount of $1,550.

It is further pleaded that by reason of this loss the Triangle Finance Company was entitled to recover this amount from the defendant on account of his warranty.

It is further pleaded that the plaintiff became obligated

to pay Triangle Finance Company its loss occasioned by the failure of payment on the note by reason of a bond issued to Triangle Finance Company by the plaintiff guaranteeing it against such losses, in consequence of which the Triangle Finance Company assigned to it the cause of action against the defendant for breach of warranty.

In brief this is an action for an alleged breach of warranty against an endorser of a promissory note instituted by the assignee of the endorsee.

By the answer the defendant first denies generally the allegations which are not admitted or traversed.

The transaction which the plaintiff described in the petition is admitted, except that it is alleged that the transaction was made with Fred C. Jarvis, a person so known to him for a long time; that there was no concealment or attempted concealment; that the transaction was made in good faith and that it was genuine in every respect; and that the person who purchased the automobile and executed the note and mortgage had the right and capacity to do so in the name of "Fred C. Jarvis."

It is pointed out here that it is not contended in the record that the defendant ever verbally or in writing made any warranty or any express or implied representation as to the identity of the person who executed the note and mortgage, or was knowingly guilty of any conduct the effect of which was to mislead the endorsee when it accepted the note and mortgage.

The evidence to support the contention of the plaintiff that this note was a forgery and that the transaction was fraudulent consists of two affidavits and certain other exhibits relating to a guardianship proceeding had in the county court of Cedar County, Nebraska, in the year 1942.

One of these affidavits was made by Perry Jarvis. The pertinent part of it is that the Buick automobile was not purchased by Fred Jarvis and the note and

mortgage were not executed by him, but that the purchase was made by Fred Clair Clay and the instruments were executed by him. He further stated that Fred Clair Clay was a grandson of Fred Jarvis.

The other affidavit was by Everett C. Rees, secretary of the Triangle Finance Company. In the affidavit he stated that he accepted the note as being genuine and one executed by Fred Jarvis, a well-known auctioneer at Laurel, Nebraska; that it was later that his company learned that the note was not signed by Fred Jarvis, but that it was a forgery; and that the automobile was driven to California by the purchaser and sold.

He further stated that the plaintiff paid the loss sustained by the Triangle Finance Company and it has become the owner of the claim by assignment and transfer.

Among the exhibits to which reference is made are an application for the appointment of a guardian of Fred Clair Clay and a decree of appointment of Fred Jarvis as his guardian. The date of the application is January 15, 1942, but the date on the decree is not decipherable.

There is nothing in these exhibits from which a reasonable inference may flow that the sale was not made to the identical person who represented himself to be Fred C. Jarvis, or that the person signing was not known to the defendant and in the community as Fred C. Jarvis, and nothing to show that he attempted or did anything to mislead or defraud the defendant. Specifically there is nothing in them to show that the signatures on the note and mortgage were other than of the name used by the signer in his everyday life and his regular transactions.

As against this there was an affirmative showing made by the defendant that this was the name used by this person since he was a very small child. At the time of this incident he was 34 years old. This showing indicates as a departure only the incident of the guardianship proceeding in 1942.

Specifically Perry Jarvis, the same person who made

affidavit on behalf of the plaintiff made a further affidavit in which he stated that he was an uncle of the person who signed the note and mortgage; that this person was born in Sioux City, Iowa, May 13, 1924, and that in August of 1924 he was placed in the home of Fred Jarvis, his grandfather, at Carroll, Nebraska, where he was raised and maintained; that in 1929 they moved to Laurel, Nebraska, where he attended public school; that he went into the Navy after which he returned and continued to live with his grandfather until about 1949 when he left; and that thereafter he returned in June 1958, but in the interim visited with his grandfather.

One Don Brittell made affidavit that he became acquainted with the person who signed the note and mortgage in 1929; that he went to school with him through the 10th grade; and that he never used any name other than Fred C. Jarvis.

The defendant made affidavit in which he related details of the transaction. These details are not in dispute. In addition he stated that he had personally known the person who signed the note and mortgage since 1924 and that during all of that time he was known as Fred C. Jarvis; and that he knew that the person making the transaction and using the name of Fred C. Jarvis was using the name as his own and not as the name of his grandfather.

In the view taken of the record, the pertinent parts of which have been summarized herein, the conclusion has been reached that this is a case wherein a summary judgment is proper under the terms of section 25-1332, R. R. S. 1943. The controlling facts are not in substantial dispute. The only question for consideration is the legal import of the facts, and as pointed out each party moved for summary judgment.

This court, in interpretation of the authority to render a summary judgment, said in Dennis v. Berens, 156 Neb. 41, 54 N. W. 2d 259:

"In considering a motion for summary judgment the

court should view the evidence in the light most favorable to the party against whom it is directed.

"A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.

"The court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists."

See, also, Clearwater Elevator Co. v. Hales, 167 Neb. 584, 94 N. W. 2d 7.

As is clear from the record this case must turn on the question of whether or not any right such as is claimed came into being in favor of the Triangle Finance Company by reason of the use by the signer of the note and mortgage in question of the name of Fred C. Jarvis, the name employed and used by him since childhood, which was well-known, and so used without any evidence of intent at the time to deceive, defraud, or mislead.

The rule covering this subject is aptly stated in 65 C. J. S., Names, § 9, p. 9, as follows: "In general, in the absence of statutory prohibition, a person, without abandoning his real name, may adopt or assume any name, wholly or partly different from his name, by which he may become known, and by which he may transact business, execute contracts, and carry on his affairs, unless he does so in order to defraud others, or he is inhibited by judicial adjudication, since it is the identity of the individual that is regarded, and not the name which he may bear or assume." This pronouncement finds full support in the following cases: National Life & Accident Ins. Co. v. Saffold, 225 Ala. 664, 144 So. 816; Beilen v. Krenn & Dato, 350 Ill. 284, 183 N. E. 330; Romans v. State, 178 Md. 588, 16 A. 2d 642; Petition of Merolevitz, 320 Mass. 448, 70 N. E. 2d 249; Mississippi State Board of Dental Examiners v. Mandell, 198 Miss. 49, 21 So. 2d 405; McGarvey v. Atlantic City & S. R. R.

Co., 123 N. J. Law 281, 8 A. 2d 385; Bartholomew v. Workman, 197 Okl. 267, 169 P. 2d 1012; Ludwinska v. John Hancock Mut. Life Ins. Co., 317 Pa. 577, 178 A. 28, 98 A. L. R. 705; Milligan Coal Co. v. Polowy, 108 W. Va. 458, 151 S. E. 429; Luebke v. City of Watertown, 230 Wis. 512, 284 N. W. 519.

Attention has not been called to any cases which announce a rule contrary to the foregoing statement and the cases cited in support of it. Also no statutory provision has been pointed to which prohibits the adoption of an assumed name and the use of it by the person who has adopted it in his affairs. The conclusion reached is that this rule should be regarded as controlling in the present instance.

The signing of the note and mortgage was not, under the undisputed facts in this case and the law, a forgery. Generally defined, forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. See, Mitchell v. State, 132 Neb. 891, 273 N. W. 806; Owens v. State, 152 Neb. 841, 43 N. W. 2d 168. In the record here there is an absence of anything indicating the existence of a fraudulent intent.

In the light of the record therefore the court erred in sustaining the motion of plaintiff for a summary judgment and in the rendition of judgment accordingly in favor of the plaintiff. The court was also in error in refusing to sustain the motion of defendant for summary judgment and in refusing to dismiss plaintiff's action.

The judgment of the district court is reversed and the cause is remanded to the district court with directions to sustain defendant's motion for summary judgment and to dismiss plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

GARNET ROSE ET AL., APPELLEES, V. BUFFALO AIR SERVICE, A NEBRASKA CORPORATION, ET AL., APPELLANTS.

104 N. W. 2d 431

Filed July 22, 1960. No. 34703.

1. Negligence. The general rule which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity is that he is charged with the duty of taking suitable precautions to avoid injury or damage to such persons or property, and his failure to take such precautions is negligence.
2. Sales: Negligence. A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm or danger to property of those who lawfully use it for the purpose for which it was manufactured and to those whom the supplier would expect to be in the vicinity of its proper use, is subject to liability for bodily harm caused to them or their property by its lawful use in a manner and for a purpose for which it is manufactured.
3. ———: ———. In order that the manufacturer of a chattel shall be subject to liability under this doctrine it is not necessary that the chattel shall be one the use of which is intended to affect, preserve, or destroy human life. The purpose which the article, if perfect, is intended to accomplish is immaterial. The important thing is the harm which it is likely to do to persons or property if it is imperfect.
4. Poisons: Negligence. All persons who deal with deadly poisons or dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury from their use.
5. Sales: Negligence. The manufacturer of dangerous substances is not an insurer that in every instance no injury will result from the use of his product as directed or recommended; but if he knows or in the exercise of reasonable care should know that if his product is used as directed or recommended it will cause or be likely to cause material injury, then he is liable to any person who in reliance upon his representations and directions uses the product for the purpose and in the manner directed and recommended and who suffers injury as a direct result.
6. ———: ———. The liability of a manufacturer in such an instance rests upon the sound rule that a manufacturer or seller of an article inherently dangerous to life or property is liable

for injury to the ultimate consumer who has purchased through a middleman.

7. ———: ———. Proof of actual knowledge that the product will be used by another than the purchaser is not required where the article is so made as to be inherently harmful. The manufacturer who puts the component parts together must be presumed to know the nature and quality of the resultant component which he solicits the public to purchase.

8. Negligence. A cause of injury may be the proximate cause thereof though it pass through a series of events if they are combined in a continuous chain through which the force or presence of the cause operated to produce the disaster.

9. ———. The person on whom a duty of due care devolves is not excused from taking necessary precautions by contracting with or relying on others to take necessary precautionary measures.

APPEAL from the district court for Buffalo County: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Tye, Worlock & Knapp, Stewart, Stewart & Calkins, and *Floyd A. Sterns,* for appellants.

Gibson & Ganz, for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

Garnet Rose, Dale Rose, and Lee Willis, the members of a partnership, were engaged in farming operations in Buffalo and Kearney Counties, specializing in the growing of sugar beets and potatoes. In 1957 they leased land owned by Ethel Boasen in the former county. At a suitable time they planted 31½ acres thereof to sugar beets, properly cared for them, and had a good growing crop of sugar beets thereon at the time of the principal event concerned in this litigation. The word "partnership" as used herein includes the members thereof above named. The sugar beets were owned 4/5 by the partnership as tenant and 1/5 by Ethel Boasen, the owner of the land. The sugar beets in August of 1957 became infested with agricultural pests known as webworms and

grasshoppers and the partnership engaged Buffalo Air Service, a corporation conducting an aerial spraying business for the control and prevention of agricultural pests and weeds, for the treatment by it of the sugar beets with a chemical known as Toxaphene by aerial spray, the method of application being a generally accepted practice for the eradication of the named pests from such a crop. Buffalo Air Service is hereafter referred to as air service. The Food Machinery and Chemical Corporation, an appellant herein, hereafter referred to as chemical corporation, was at all times important to this case engaged in the manufacture and sale of insecticides and pesticides. Garnet Rose, one of the members of the partnership, about August 20, 1957, contacted Ted Smith, one of the two stockholders of the air service, hereafter referred to as Smith, and engaged it to spray the crop of sugar beets of the partnership with Toxaphene. Garnet Rose definitely specified Toxaphene because he said he had used it on previous occasions with good results. This was done on Saturday, August 24, 1957. Garnet Rose testified he examined the field the following Monday morning. The beets then showed great evidence of damage. The leaves were generally wilted and flattened out. He checked the field at different times until the time for harvest. The beets never recovered.

Smith, who actually sprayed the field of beets, acting for the air service, had been in that business for 10 years. He was employed by Fred Voigt until 1956 and thereafter acted for the air service, doing all types of agricultural applications. He had used and was familiar with the use of Toxaphene and 2,4-D. The witness had sprayed 40 acres of pasture with 2,4-D Wednesday, August 21, 1957, and did not spray again for a day or so. He then loaded the airplane with a Toxaphene mixture with the intention of spraying the sugar beets of the partnership. The airplane was the one which had been used on August 21, 1957, to spray a pasture with

2,4-D and any residue thereof in the plane had not been eliminated from it after the pasture was sprayed. Smith was on his way to spray the sugar beets when he decided he had not cleaned the airplane since he had used 2,4-D in it to spray the pasture and he went back to the airport and cleaned the airplane. This was probably about August 22, 1957. The practice which the air service uniformly used in attempting to eliminate from the plane any residue of chemicals previously used therein was placing liquid detergent and warm water in the spraying tank of the plane, leaving it there for a limited time, and then spraying the detergent and water from the plane while it was in motion. The tank was thereafter filled with cold water two times and sprayed from it. This method of cleaning the plane had not resulted in any difficulty in the 10 years of spraying experience of Smith. He had used from eight to ten different kinds of chemicals in his experience since 1949. He had used 2,4-D and was familiar with its use and what it would do. The material placed in the airplane before it had been cleaned after spraying the pasture with the intention of spraying the sugar beets of the partnership was drained into a 30-gallon drum and a 5-gallon can at the airport, placed next to the hangar, and it continued there for several months. This material contained the residue of 2,4-D from the aerial spraying of the pasture in which that chemical was used.

The air service had before August 24, 1957, purchased a 55-gallon drum of Toxaphene from William Munroe of Grand Island, a wholesale dealer in agricultural seeds and chemicals. The drum had a label and the trade name of chemical corporation on it. The air service also had a 5-gallon can of Toxaphene, a chemical corporation product, which it secured in a transaction with Fred Voigt in the fall of 1956. It was bought by him in August 1955. It was sealed with a plastic seal and had on it the label and brand name of Niagara which was a chemical division of chemical

corporation. This can was opened by Smith on August 24, 1957, for the first time. He broke the seal that day. This can was represented by the label on it to contain Toxaphene. The morning of August 24, 1957, 5 gallons of Toxaphene were drawn from the 55-gallon drum into a gasoline can which was used by the air service to measure chemicals and it was placed by the airplane which was to be used to spray the sugar beet field of the partnership. The 5 gallons of Toxaphene secured from Fred Voigt after it had been opened were placed near the airplane. Smith left then in another airplane to do some spraying which required probably 20 minutes. It was intended that Gayle Brandt, hereafter referred to as Brandt, would put the contents of the two cans of Toxaphene in the mixing tank while Smith was absent. Brandt did this and then brought the solution up to 31 gallons by adding water. When Smith came back Brandt was gone and the airplane had been unattended for a short time. The gauge on it indicated the amount of the mixture in the tank and it at that time indicated that Brandt had put the chemical and water therein. The plane was ready for spraying. It was taken by Smith and he then sprayed the sugar beet field of the partnership.

The air service got the 55-gallon drum of Toxaphene about 2 months before August 24, 1957, and had used all of its contents in spraying in the regular conduct of its business except the 5 gallons drawn from it on that day. The contents of the drum had been used as Toxaphene as it was labeled and represented when it was purchased and there had never been any complaint or claim of damage from its use. Smith had never had any difficulty in the 10 years he had been engaged in the business of using chemicals for agricultural spraying. The airplane was not cleaned after the spraying of the sugar beets of the partnership but it was used to spray soy beans with Toxaphene which was done successfully without trouble or injury to the crop. The

material used to spray the sugar beets was a Niagara chemical product and only two 5-gallon quantities labeled Toxaphene and water were put in the tank of the plane and the contents thereof were what was sprayed on the sugar beet field of the partnership. The air service used from 150 to 200 gallons of 2,4-D in 1957 and from 250 to 300 gallons of Toxaphene which generally came in 5-gallon containers. The empty containers were placed behind the hangar and hauled away thereafter when there were enough of them to fill a pick-up truck.

After Smith heard the report that the spraying of the sugar beets of the partnership had damaged them he located the 5-gallon Toxaphene can, the contents of which were used in that spraying operation. He found it behind the hangar with about 20 other empty 5-gallon cans. He positively identified it as that particular can. It was an older one and was rusted when the air service got it from Voigt in 1956. The other empty cans were newer than the one in question. Smith and Lavern Van Buskirk sent it 2 days later to the chemical corporation. It was a green can with the trade name of Niagara Toxaphene thereon and the label of the chemical corporation fully described the contents of the can. There was nothing about the can to indicate that it contained any amount of 2,4-D. When Smith recovered the can there was a small amount of liquid in it. This was not disturbed but was left in the can when it was sent to the chemical corporation in the identical condition as when the can was recovered 2 days previously by Smith. There was generally a small amount of the contents of a can used for chemicals that did not pour or drain out when the can was emptied because there was a small recess in the can that had this effect. It was a lot of work to empty completely the contents of one of these cans. Smith said he detected the odor of 2,4-D in the 5-gallon can when he recovered it from behind the hangar. There was no empty 2,4-D can among those

behind the hangar at that time. The odor of 2,4-D, Smith said, is something like ammonia. The odor of Toxaphene is not unusually strong but it is distinctive. The witness could not characterize or associate it with any other odor with which he was familiar. He did not notice any odor or thing that he thought was unusual when he took the airplane and proceeded to and sprayed the sugar beet field of the partnership. He said that when one was subjected to chemicals for a period of time the odor of them is difficult to distinguish one from the other unless there is something quite unusual and a conscious effort is made to do so. The air service stored its various chemicals in the hangar along the north wall which was about 75 feet long. It had to take them in the containers that were available when it ordered them. It had at times as many as a hundred 5-gallon cans of chemicals there at one time, including Toxaphene and 2,4-D, and it had to be diligent and attentive not to get 2,4-D into its Toxaphene.

Smith saw the beets 2 days after they were sprayed. The leaves were wilted and down from what they should have been. He saw them frequently until harvest time. The leaves changed to a darker color until then. There was some slight second growth of leaves on some of the beets but they did not recover from the damage done them by the spraying.

The information concerning the receptacle used to transfer material from the 55-gallon drum to the tank on the airplane August 24, 1957, was that it was an old 5-gallon gasoline can used to measure chemicals by the air service. Brandt, a stockholder of it, put the contents of this can, the contents of the 5-gallon can acquired by the air service from Voigt, and water in the tank of the airplane that day and that was all the material that was in it. As he left the plane in the airport he saw Smith coming into it and there was no one else in that vicinity. Brandt said Dr. Mason stated: "'* * * we will see to it, and we'll take care of it for you'"

and that was why the chemical corporation had the can and everything.

Munroe & Son of Grand Island, wholesaler of agricultural seeds and chemicals and who handled chemical corporation products, employed Lavern Van Buskirk from June 15, 1950, to November 1, 1958. He, acting for his employer, sold chemical corporation's Toxaphene to Fred Voigt who was then the owner and operator of an aerial spraying business in Kearney. When Smith called Lavern Van Buskirk after the beets were damaged, he consulted Doug Nelson, district manager of chemical corporation, for instructions. Lavern Van Buskirk made an investigation and reported to Doug Nelson, sending him the 5-gallon can, specimens of damaged beets and beet tops from the beet field of the partnership, and photographs of the beets in the field. The can was a 5-gallon chemical corporation container with a large label securely fastened thereto bordered in yellow paint. It gave in detail the contents of the container, representing that it was Toxaphene, and instructions for its use. On another part of the can surrounded by a substantial border in large letters was the word "Niagara." The border around the word and the word were painted with yellow paint. In the yellow border above the word "Niagara" were the words "When you buy" and on the border below the word "Niagara" were the words: "You buy protection." Generally Toxaphene and 2,4-D, if a good quality, are very nearly the same color and cannot be distinguished by their color. The container generally had a "batch number" which is put on when it is filled but one could not be found on the can in question. Lavern Van Buskirk examined the can and found no evidence it had been cleaned, washed, or tampered with. The can in evidence (exhibit 1) appeared to be the one sent to the chemical corporation. He delivered chemical corporation products, especially Toxaphene, to Voigt before he sold his aerial spraying business to Smith.

A practicing soils chemist who operated a soils testing laboratory in Kearney since 1956 was asked by the air service to test the soil, the beet tops, and beet roots for any residue of 2,4-D. The specimen beets taken from the ground and brought to his laboratory were not selected or taken from the field by the chemist. An analysis of the composite samples furnished him showed that there was a sufficient quantity of 2,4-D to destroy the crop. He testified that almost any amount of 2,4-D would be injurious to a crop of beets. His tests showed that there was a concentration of 390-some parts per million of 2,4-D over the area from which the samples were given to him. A "part per million" is a definition used in chemistry to determine very small quantities. An exceedingly small quantity of 2,4-D will kill a broadleafed plant. The quantity of 2,4-D was sufficient to damage the crop of beets very severely.

The sugar beet field of the partnership was under contract with the American Crystal Sugar Company, hereafter designated sugar company. The agricultural superintendent for that company since 1945 testified he had many years of experience working with sugar beets; that every year there was a case when an application of 2,4-D had been made to sugar beets; and that he was constantly on the lookout for it. He noticed the field in question in this case about a week after it was sprayed. He knew when he first entered the field that it had been sprayed with 2,4-D because of its appearance. He could not detect it by odor. He visited the field once each week thereafter and took a specimen of the beets until November 12, 1957. They were analyzed for sugar content, purity, breakdown of sugar cells, and build-up of impurities in the beets. The result was the first sample had about 9 percent of sugar and it decreased until the last sample had about 3.6 percent. The breakdown of sugar cells causes the material in the beet of which sugar is made to deteriorate and the impurities to build up until it is impossible to

extract sugar. This crop had no commercial value. It was a complete loss and the tops were gone and unsafe for feed. The beet roots were completely rotted away. They were damaged to the extent that they were dead within 2 months. There was some small, green growth from the crown of some of the beets but the root system was dead. The amount of 2,4-D applied to the field in this instance, in the opinion of the witness, would have been similar to the amount generally used in spraying weeds. The field was uniformly sprayed except a small portion that showed little damage around the field and near two power poles. This would not have been true if there had been only a small amount of 2,4-D in the spray. In 1957 sugar beets sold for about $13 per ton. The cost of harvesting and delivering the beets from the field of the partnership to the receiving station would have been from $2 to $3 per ton. The contract of the sugar company with the partnership relieved the sugar company from buying the beets if they were exposed to 2,4-D. The sugar company declined to attempt to process the beets even though an offer was suggested to pay the expense of doing so.

A member of the partnership testified that about 20 acres of the field of the sugar beets were planted April 20, 1957, the balance about 2 weeks later, and that there was normal germination. The field was treated to standard fertilization, was under irrigation, and was cultivated four or five times. The beets were thinned and were irrigated after their cultivation. The leaves of the beets were fully matured by the middle of August. The witness was near the field when it was sprayed and was passing it the following day when he detected an odor from the material used in spraying it which he knew was 2,4-D because he had used it many times. He examined the beets and found they had been damaged. The leaves were wilting, falling down, and were some darker than their normal condition. He saw the field of beets frequently until about the middle of Oc-

tober 1957. A week after August 24, 1957, the leaves of the beets were wilted, turned black, and had fallen down. This was uniformly true except some small strips possibly a couple rows wide for a short distance which showed no visible damage. The damaged beets never recovered. There was slight new growth on the crown of some of them. The sugar company notified the witness it would not accept the beets after the field man for the sugar company had examined the field. The partnership was warned not to make use of the beet tops because of danger of poisoning. The witness said the market price of sugar beets in 1957 was about $14 per ton and beet tops were worth $10 per acre. A field of beets near and in all respects similar to the field of the partnership before it was damaged produced 14 tons of beets per acre that year. The work and expense of raising the beets had been done and incurred except harvesting and hauling them which would have amounted to about $2 per ton.

Another member of the partnership who had been raising sugar beets since 1930 testified that in his opinion the field of beets concerned in this case would have produced about 16 tons per acre if it had not been damaged. He estimated the crop as 480 tons of beets and that the beet tops would have had a value of $10 per acre.

Curtis L. Mason of Middleport, New York, was and had been for 7 years manager of technical service of the chemical corporation and as such he handled all technical problems, which were many and extensive, in the sale of Niagara products for that corporation, including technical problems that came up in the field such as the situation that occurred in connection with the sugar beets involved in this case. He qualified for his position by pursuing a college course in agriculture. He majored in agronomy in Texas A & M College, secured a Master's Degree in plant physiology, and thereafter he worked on a joint major of plant physiology and plant pathology in the University of Wisconsin. He served

a period in the Air Force at the conclusion of which he resumed his graduate studies in the University of Illinois, completed them, and was awarded by that institution a Doctor's Degree because of which he is appropriately spoken of as Dr. Curtis L. Mason. These studies covered a period of 9 years exclusive of his term of military service. He is spoken of herein as Mason.

Chemical corporation is engaged in the business of agricultural chemicals exclusive of fertilizer but including insecticides, fungicides, and herbicides. These products are sold throughout the United States, Canada, and Mexico. In 1954, the year the material was produced which was contained in the 5-gallon can secured by air service from Voigt, chemical corporation had 12 plants, a warehouse at each plant, and field warehouses where materials of this type were stored all over the country. The witness first heard of the damage to the sugar beets of the partnership on August 29, 1957, by a telephone communication from Doug Nelson. Mason discussed the matter with Dr. Hagood, a herbicide specialist who is concerned with products that will kill weeds. Mason received the can (exhibit 1) and the beet samples which were transmitted as stated above. He and Dr. Hagood examined the beet specimens and found that they showed very definite characteristics of having been treated with 2,4-D or a similar substance. Mason gave the can to the chief chemist of the chemical corporation and requested him to determine what was in it. A biological assay was made by applying a measured quantity of material taken from the can to tomato plants because this was faster than making a chemical analysis. The result of this was a clear demonstration that there was definitely 2,4-D in the specimen taken from the can.

Mason had a conversation with Smith and Brandt at their office in Kearney October 9, 1957, and they told him of the operation of the spraying of the beets and their activity before and after that. Mason said he did not

tell them that his employer would take care of everything incident to the spraying and the damaging of the beets. He examined the beets in the field the following day and they exhibited definite evidence of having been subjected to an application of 2,4-D. There were leaves on the ground. There was a limited new growth on some of the beets and the witness was of the opinion the beets were not then dead but were unhealthily alive. He also said that the beets were affected with a disease likely to be present when they are in a declining state of vigor. Substantially all the beets in the field were affected. The witness did not know then whose 2,4-D it was or how much of it had been used. When he returned to his office he learned the result of the chemical analysis of the substance in the can. He was in Kearney on December 4, 1957, and told Smith and Brandt that the investigation indicated a concentration of 41.1 percent of 2,4-D, that it was the amine salt 2,4-D, and that that was the strength normally contained in a standard commercial formulation of 2,4-D which would be equal to 4 pounds of actual 2,4-D per gallon. There are many amine salts of 2,4-D and it was not then known which amine the specimen was. Mason told Smith and Brandt that the findings of chemical corporation showed that the remaining contents of the can (exhibit 1) were a 4-pound-per-gallon 2,4-D formulation and that further checking of the effects of 2,4-D upon sugar beets showed quite conclusively that the effects observed on the beets of the partnership were not nearly as severe as would have occurred had 5 gallons of 4-pound 2,4-D been applied to the beets. Smith and Brandt asked Mason what had happened and he told them that he did not know but that their method of cleaning their spraying equipment was not an accepted one for eliminating 2,4-D from a spraying facility and that there were other chances for contamination of the material in their spray tank. He testified how material of a previous spray can remain in the spray equipment of a plane. He said

1 or 2 quarts can remain in such a facility and if 1 gallon of diluted 2,4-D were left in the equipment from a previous spray and 31 gallons of new material not containing 2,4-D were added to it, the resulting 32-gallon mixture would contain 5,170 parts per million of 2,4-D. He explained that 2,4-D can cling to the metal inside the tank and equipment. Mason explained that the spraying equipment of a plane consists of a tank, pump, and connection from the tank to the booms under the wings. The material is mixed in the tank and it is applied by being pumped through the lines, the booms, and the nozzles in the booms. The outlet from the tank is frequently or generally not entirely smooth on top so that all of the material in the tank will not drain out. The booms cannot be completely emptied though the pump is operated long after all the material possible to remove from the tank has been pumped out because the nozzles of a sprayer are generally inserted into the side of the booms and point down. The liquid, of course, gets down to the point where it is level with the outlets to the nozzles, leaving an air space over the top with some liquid in the lower portions of the booms. There is enough space over the top so that the push of the pump will exert pressure over the top of the water and out through the nozzles without eliminating the remaining liquid out of the booms and he estimated the probable amount thereof as from 1 to 2 quarts.

The witness explained "parts per million" by saying that 100 parts per million would be 1 part in 10,000; that 10,000 parts per million would be 1 part per 100; that 1 part per 100 is 1 percent; 10,000 parts per million would be 1 percent; 1,000 parts per million would be 1/10 of 1 percent; 100 parts per million would be 1/100 of 1 percent; and 10 parts per million would result in 1/1,000 of 1 percent. Similarly, then, going back to 1 part per million the result is 1/10,000 of 1 percent or not very much.

He told Smith and Brandt that he did not know how

the 2,4-D got into the mix but he did know from the evidence that there could not have been 5 gallons of 5-pound-per-gallon 2,4-D put into the tank. Mason told the partnership that because of these things chemical corporation could not accept any responsibility for the damage to the beets, that the product of his company was not at fault in causing the damage, and that the owners of the beets should look to the air service for compensation for it.

Chemical corporation manufactures Toxaphene. That is a general name of it. The specific trade name of it is "Toxakil Miscible." Toxaphene is manufactured in 1,000-gallon batches in a steel kettle of 1,300-gallon capacity. When the manufacture is completed the material is drawn off into containers of 55-, 30-, or 5-gallon capacity. This is a carefully supervised operation. The containers are manufactured by Jones & Laughlin Steel Company. The contents of the can in question herein (exhibit 1), which was secured by air service from Voigt, were manufactured in 1954 at Jacksonville, Florida, placed in the can, and sealed. The evidence of the contents is on the can, except the fact that it was sealed which has been established by evidence. The material placed in the can was a part of a 1,000-gallon quantity of Toxaphene made at one time. All of it was disposed of in the regular course of business of the chemical corporation and no complaint was made concerning any of it except that involved in this case. This is the only instance in which it has been claimed that Toxaphene made by the chemical corporation and supplied by it contained 2,4-D. There has been no 2,4-D manufactured at Jacksonville by or for chemical corporation and there has been no 2,4-D used there in the manufacture of any other products by or for it. Chemical corporation has never manufactured 2,4-D. All of the 2,4-D handled by it since 1950 came from Dow Chemical Company of Midland, Michigan, which makes and packages it in yellow steel containers with a purple band around each of which the

can (exhibit 19) is a specimen, and each had a label attached furnished by chemical corporation. The 2,4-D handled by it is made by Dow Chemical Company, packaged by it, and a label of chemical corporation placed thereon by Dow Chemical Company. Dow Chemical Company sells it to chemical corporation packaged in the containers furnished by it with its label placed on the containers. The packages are sold and delivered by chemical corporation in exactly the condition in every respect as they came from the Dow Chemical Company. This procedure has always prevailed.

Mason said it would require from 500 to 1,000 parts per million of 2,4-D to cause the damage the beets of the partnership sustained and that more than that would have killed them. Even as little as 5 parts per million of 2,4-D would have caused the twisting and curling of foliage that the beets in controversy sustained. If 5 gallons of 2,4-D mixed with 5 gallons of Toxaphene and 21 gallons of water, a total of 31 gallons, had been applied to the field of sugar beets, they would have been killed because such a mixture would amount to 77,000 parts per million of 2,4-D in a 31-gallon solution.

Chemical corporation stored Toxaphene and 2,4-D in the same storehouses. Its labels were printed in the same shop. These were sorted by chemical corporation and the ones for Toxaphene containers were sent to the plants making it and the ones for 2,4-D containers were sent to Dow Chemical Company. Mason said there was no instance when chemical corporation had any trouble in getting labels mixed up or placed on the wrong container. He was in a position to know about this and he never heard of an instance of any label of chemical corporation having been placed on the wrong container either as to material or size of the container. He said great care was used about that procedure; and if it ever happened that a label on a 55-gallon drum was printed 5 gallons, that would be changed from 5 to 55. He never heard of an error of that kind or an error of any kind

concerning the products handled by the chemical corporation. He knows it was very careful as to all details and he would be surprised to find such an error. His attention was then called to the label on the can in question (exhibit 1) secured by the air service from Voigt, especially as to the number of gallons it represented the can contained. He then admitted that the label read 55 gallons when it should have been 5 gallons and that that was an error made by the chemical corporation. Mason said the 2,4-D which the corporation secured from Dow Chemical Company was in yellow containers on each of which was a purple band. A 5-gallon can containing Niagara's formulation of amine 2,4-D made in 1955 was produced, shown to the witness, and placed in evidence (exhibit 19). It has no purple band on it. This was another error.

Mason said on cross-examination that he did not deny that the sugar beets were damaged by 2,4-D; that the spraying of them was the cause of damage because somewhere 2,4-D was being carried and was applied to the beets in this particular spray job; or that the air service used Niagara products in the spray mix which was applied to the beets. Mason also conceded that the beets were sprayed and thereby damaged by 2,4-D beyond having any value. The thing he did not agree with was that it was a chemical corporation product that caused the damage. In other words, he contended it was not 2,4-D produced by Dow Chemical Company for his employer which caused the damage.

The chief chemist of the Niagara Division of the chemical corporation opened the can (exhibit 1) about September 4, 1957, after it was received in New York. He removed the contents of it which were about 1¼ ounces. He examined and analyzed a specimen of it and found that the material was not Toxaphene or Toxakil Miscible as stated and represented by the label on the can. He could not find any Toxaphene in the material. He by chemical analysis determined the material taken

from the can was undiluted, full-strength 2,4-D. The witness could not determine that it was Niagara 2,4-D, the product handled by chemical corporation as opposed to 2,4-D produced or supplied by some other company.

A chemist of the central research laboratory of the chemical corporation specializing in infra-red spectroscopy, a method of identifying chemical compounds by their ability to absorb infra-red light, testified that he tested the material furnished him by Dr. Hagood (which was a specimen of the material that was in the can, exhibit 1, in question in this case). He determined it was 2,4-D, more specifically identified as "diethanolamine salt of 2,4-D." He said he also made a test of Dow Chemical Company 2,4-D and that his tests established conclusively that the 2,4-D in the specimen brought to him by Hagood was not the same type of 2,4-D as the Dow Chemical Company 2,4-D which is a Niagara product. Niagara 2,4-D, he testified, is mixed "ethanol and isopropanolamine salts of 2,4-D." It is not the same as diethanolamine which is what the suspect specimen was that came from the empty Toxaphene can (exhibit 1) secured by the partnership from Voigt.

The substance of the cause of action against appellants as alleged by appellees is that they were the owners of a field of sugar beets which was infested with webworms and grasshoppers; that they contracted with the air service on or about August 20, 1957, for it to apply to the field of sugar beets a chemical known as Toxaphene by aerial spray for the purpose of eradication therefrom of the webworms and grasshoppers; that Toxaphene and the described method of application were generally accepted as a proper procedure for the elimination of such pests from growing sugar beets; that the air service to perform its contract with the owners of the sugar beets purchased, for the purpose of spraying the sugar beets, a chemical from chemical corporation represented by it by virtue of a label on each container of the chemical to be Toxaphene; that the chemical was

not as represented but it contained 2,4-D; that about August 24, 1957, air service negligently applied by aerial spray to the growing sugar beets the chemical purchased from the chemical corporation which was other than Toxaphene and which contained 2,4-D, in violation of the contract between the owners of the sugar beets and the air service; that as a result of the negligent application thereof by the air service and the negligent mislabeling and selling of the chemical by the chemical corporation as aforesaid, the sugar beets were destroyed and made wholly valueless; and that the owners thereof were damaged thereby in the amount of $7,030 for which judgment was sought against appellants.

The answer of the air service, so far as is required to be noticed here, denied the claims of appellees except it admitted that it contracted with them to apply Toxaphene to the sugar beets of appellees by aerial spray and that the chemical and the method of application were generally an accepted procedure for the eradication of webworms and grasshoppers from growing sugar beets. The air service also stated therein that about August 24, 1957, it undertook to spray the sugar beets with Toxaphene purchased by it from chemical corporation by placing it in the tank of an airplane and preparing it in accordance with the general practice for spraying a crop of sugar beets for such pests; that it did spray the sugar beets of appellees; that the beets were damaged because thereof by what appeared to be 2,4-D in and upon the beets; that an investigation was made and it was discovered that the container and the contents thereof purchased from chemical corporation by the air service contained 2,4-D; and that any damage caused by the 2,4-D which was in said container labeled as Toxaphene by the chemical corporation and any damage sustained by appellees were caused by the negligence of the chemical corporation and not by any negligence of the air service.

The answer of chemical corporation admitted that in

the latter part of August 1957 the beet crop of appellees did show evidence of the application of the chemical 2,4-D and that chemical corporation was at the times mentioned in the amended petition of appellees engaged in manufacturing and supplying insecticides and pesticides. The answer denied generally the statements of the amended petition of appellees and specially denied that chemical corporation manufactured, packed, sold, supplied, or delivered the chemical 2,4-D in a container mislabeled Toxaphene to any of the parties to this case or anyone else; that air service purchased any chemical from chemical corporation, its employees, agents, or representatives; that any sale of misbranded chemical or container was made to any parties to this case or anyone else; and that chemical corporation misrepresented any chemical purchased by any parties to this action or anyone else. The answer alleged that any damage to the beet crop of appellees was caused by the negligent, careless, and improper application of chemicals by the air service.

The result of the trial was a verdict for appellees against both appellants. A judgment was rendered on the verdict. Each of the appellants filed a motion for judgment notwithstanding the verdict and a motion for new trial, each of which was denied and because thereof error is assigned by each of the appellants.

It is established in the record that the air service sprayed the sugar beets of appellees with a chemical manufactured or supplied by chemical corporation mixed with water; that there was 2,4-D in the solution sprayed on the beets by the air service; that 2,4-D is harmful to sugar beets; and that it was the cause of the destruction and loss of them and thereby appellees sustained damage. The manager of technical service of chemical corporation and its principal witness at the trial conceded that the sugar beets were damaged by 2,4-D beyond having any value; conceded that 2,4-D was applied to the beets when they were sprayed; and he did not deny

that the air service used chemical corporation products in the spray mix which was applied to the beets. Chemical corporation by its answer disclaimed any negligence on its part and asserted that the damage to the beets was caused by the negligent and improper application of chemicals thereto by the air service. Chemical corporation in its brief concludes that the only explanation the evidence will support is that the 2,4-D came from the air service's spraying equipment or measuring can. Air sirvice by its pleading denied any negligence by it in the spraying of the sugar beets and asserted that the damage to them was caused by the presence of 2,4-D in the container supplied by chemical corporation which was labeled Toxaphene; and alleged that the damage of appellees was caused by the negligence of chemical corporation.

Hickman v. Parks Constr. Co., 162 Neb. 461, 76 N. W. 2d 403, 62 A. L. R. 2d 1040, declares: "The general rule which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity is that he is charged with the duty of taking suitable precautions to avoid injury or damage to such person or property, and his failure to take such precautions is negligence."

Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 64 N. W. 2d 88, states: "A vendor and the manufacturer or supplier of a chattel who know or have reason to know that it is likely to be dangerous when used and which is purchased as safe for use in good faith reliance upon their professions or representations of safety, competence, and care, are subject to liability to the purchaser or to others whom they should expect to share in or be in the vicinity of its use, for damages proximately caused by their failure to exercise reasonable competence and care to supply the chattel in a condition safe for use."

Restatement, Torts, § 395, p. 1073, states the law in this

manner: "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured." Following the above on page 1074 is Comment a, which states: "As heretofore pointed out * * *, the precaution necessary to comply with the standard of reasonable care varies with the danger involved. Consequently the character of harm likely to result from the failure to exercise care in manufacture affects the question as to what is reasonable care." On the same page Comment b states: "In order that the manufacturer of a chattel shall be subject to liability under the rule stated in this Section, it is not necessary that the chattel shall be one the use of which is intended to affect, preserve or destroy human life. The purpose which the article, if perfect, is intended to accomplish is immaterial. The important thing is the harm which it is likely to do if it is imperfect."

In Colvin v. Powell & Co., 163 Neb. 112, 77 N. W. 2d 900, it is said: "In principle, a manufacturer or other person owning or controlling a thing that is dangerous in its nature or is in a dangerous condition, either to his knowledge or as a result of his want of reasonable care in manufacture or inspection, who deals with or disposes of that thing in a way that he foresees or in the exercise of reasonable care ought to foresee will probably carry that thing into contact with some person, known or unknown, who will probably be ignorant of the danger, owes a legal duty to every such person to use reasonable care to prevent injury to him. * * * In the application of the principle it is immaterial whether or not the conduct of a defendant amounted to a breach

of contract between him and the immediate buyer from him. The duty is not created by contract, but is an instance of the general human duty not to injure another through disregard of his safety." In the opinion there is quoted with approval the following: "In 49 C. J., Poisons, § 4, p. 1045, citing numerous authorities, it is said: 'All persons who deal with deadly poisons or noxious and dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury from their use.' "

In Carter v. Yardley & Co., 319 Mass. 92, 64 N. E. 2d 693, 164 A. L. R. 559, it is stated: "At the trial of an action of tort for alleged personal injury sustained when the plaintiff was burned by the application to her skin of a perfume manufactured and bottled by the defendant and sold by him to a retailer from whom the plaintiff purchased it, a finding of want of care in the processes of manufacture and bottling which caused the alleged injury was warranted by evidence that such processes were fully in the defendant's control, that no examination of the contents of the bottle by the retailer was practicable, that when purchased by the plaintiff the perfume was still in the same condition as when bottled * * *." In the body of the opinion the court said: "Plainly the defendant, when it manufactured and bottled its perfume, including the bottle in question, and put it into the channels of trade, expected that those channels would carry each bottle into the hands of some ultimate consumer who would be likely to apply the contents to her skin. If any bottle should contain a harmful ingredient, injury to some unknown consumer rather than to a middleman or retailer must have been anticipated."

A person who had no direct contractual relations with a manufacturer may nevertheless recover from such manufacturer for damages to his property caused by its negligence in the same manner that such a remote vendee or other third person may recover for personal

injuries. The generally accepted doctrine is that there may be a recovery for injury or damage to property if a case in tort law of negligence is made against the manufacturer, that is, if foreseeability and breach of duty are established, if the manufacturer can be found to have been negligent, and that such negligence is the proximate cause of the property damage.

The case of E. I. DuPont de Nemours & Co. v. Baridon, 73 F. 2d 26, involved the liability of the manufacturer of a seed disinfectant or fungicide for damages resulting from its use. The court said: "A rule which would permit a manufacturing chemist, who offered his product to the public for use in the treatment of plants or animals, to so carelessly prepare his product or to so carelessly direct the manner in which it was to be used as to destroy or injure the property of one who purchased it from a dealer and who in ignorance of its dangers used it for its intended purpose and in accordance with the directions of the manufacturer, and which would deny to the person whose property was injured any redress, although the destruction of his property was the natural, probable, and almost certain consequence of the manufacturer's negligence, should not, we think, receive the sanction of this or any other court. * * * The manufacturer is not an insurer that in every instance and under all circumstances no injury will result from the use of his product as directed or recommended, but if he knows or in the exercise of reasonable care should know that if his product is used as directed or recommended it will cause or be likely to cause material injury, then he is liable to any person who, in reliance upon his representations, directions, and recommendations, uses the product for the purpose and in the manner directed and recommended by the manufacturer and who suffers injury as a direct result * * *."

Genesee County Patrons Fire Relief Assn. v. L. Sonneborn Sons, Inc., 263 N. Y. 463, 189 N. E. 551, contains this: "It is earnestly contended by appellant that

even though liability might exist for personal injuries resulting from the explosion there is no legal liability for the property damage resulting. * * * The argument leads to an illogical conclusion. If it were reasonably presumable that the preparation would be used near a flame and result in an explosion and fire which might fairly be expected to injure the person using the material, it would also be reasonably foreseeable that the same fire would cause property damage. * * * To hold that an owner of a building injured by an explosion and fire caused by the use of the material could recover for his personal injury but could not recover for the damage to his clothing or the destruction of his building would be anomalous."

Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609, 269 P. 975, involved damages for injuries sustained by plaintiff from the use upon his orange orchard of a product sold by defendant named "Citro-mulsion" and used for spraying citrus trees to destroy scale. The court said: "The liability of the defendants rests upon the sound rule that a manufacturer or seller of an article inherently dangerous to life or property is liable for injuries to the ultimate consumer who has purchased through a middleman. (17 A. L. R. 674, 683.)"

In Ellis v. Lindmark, 177 Minn. 390, 225 N. W. 395, it is stated: "The evidence sustains a finding of the jury that the defendant drug company was negligent in sending a barrel of raw linseed oil to a retail druggist in response to an order for a barrel of cod liver oil. * * * The evidence sustains a finding that the defendant Lindmark, a retail druggist, who ordered cod liver oil from the drug company and sold to the plaintiffs, who were poultry raisers, the raw linseed oil as cod liver oil, was negligent. * * * The plaintiffs who purchased from the retailer could maintain an action against the drug company though they had no contract relations with it."

The prevailing doctrine as to the liability of a manufacturer to a remote vendee for negligence was ex-

pressed in, if not originated by, the decision of MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F 696, Ann. Cas. 1916C 440, which contains these statements: "We hold, then, that the principle of Thomas v. Winchester (6 N. Y. 397) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. * * * There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. * * * We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. * * * The dealer (who sold the machine to the plaintiff) was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. * * * The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be. * * * The contractor who builds the scaffold invites the owner's workmen to use it. The manufacturer who sells the automobile to the retail dealer invites the dealer's customers to use it. The invitation is addressed

in the one case to determinate persons and in the other to an indeterminate class, but in each case it is equally plain, and in each its consequences must be the same."

In United States Radiator Corp. v. Henderson, 68 F. 2d 87, the court said: "It is impliedly, if not expressly, conceded however by counsel that where the article involved is inherently and imminently dangerous actual knowledge on the part of the manufacturer of the danger need not be proven. Thornhill v. Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474, 491: 'Proof, however, of actual knowledge is not required where the article is so made up as to be inherently harmful. The manufacturer who puts or causes the component parts to be put together, or accepts them as his own after they are assembled, must be presumed to know the nature and quality of the resultant compound which he solicits the public to purchase.' But we answer the contention with the opinion in MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, which has been so widely followed in both state and Federal courts, wherein false labels on poisons * * *, a defective scaffold for workmen, a defective coffee urn, and a defective automobile wheel were included in the same class relative to the question of knowledge."

The contents of the can (exhibit 1) were placed therein and the can was sealed at the plant of chemical corporation in Jacksonville, Florida, in 1954. The label on the can represented the contents as Toxaphene, had a detailed statement of the ingredients thereof, and instructions for its use. The can was sent to a dealer in agricultural chemicals at Grand Island. This dealer handled chemical corporation products. That middleman furnished it to Voigt, an aerial sprayer in Kearney. Air service secured it from Voigt in the original can in 1956 in the condition it was when it and the contents thereof were processed at the plant where the chemical was made. The seal of the can was removed

by Smith August 24, 1957, the chemical in the can was made a part of a spraying solution, and the beets were sprayed with it that day. The events involving the can and its contents constituted a chain from the time it was filled in 1954 until the chemical therein was applied to the beets on August 24, 1957. It was ascertained after the beets showed evidence of injury from the spray that the can contained pure, full-strength 2,4-D. A cause of injury may be the proximate cause thereof though it pass through a series of events if they were combined in a continuous chain through which the force or presence of the cause operated to produce the disaster. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758.

Air service attempts to escape liability to appellees for the destruction of their sugar beets caused by the application to them by air service of 2,4-D by saying that it secured from chemical corporation a chemical represented by it to be Toxaphene; that it was prepared in a proper manner and in accordance with general practice for spraying the sugar beets for webworms and grasshoppers; that the air service sprayed the beets of appellees with it in a proper manner and by a generally accepted practice; that the container of the chemical so secured by it from chemical corporation was labeled Toxaphene but there was therein, without notice to or knowledge of the air service, 2,4-D which caused the destruction of the beets; that the air service was not negligent but chemical corporation was; and that its negligence was the proximate cause of the damage. The air service was by contract with the partnership employed to spray the beets with Toxaphene. The partner who made the arrangement therefor specified Toxaphene because that was what the partnership had been using and it had been getting good results. Air service had a duty to spray the sugar beets with Toxaphene and no other insecticide or chemical. It could not delegate its obligation to use due care to do this or depend on anyone else to take precautionary measures in

that regard. There is no claim that air service made any investigation, examination, or test to ascertain that the can (exhibit 1) contained Toxaphene and that alone except it examined the outside of the can. Air service could not accept the information there exhibited, spray the beets with 2,4-D, thereby destroy them, and escape liability to appellees for the damage caused. It could not be relieved from its responsibility to protect appellees against the hazard that the can furnished by chemical corporation did not contain Toxaphene but did contain 2,4-D simply because the can was labeled and represented to contain Toxaphene. Hickman v. Parks Constr. Co., *supra,* contains this: "The defendant could not be relieved from its responsibility to protect against the danger from the open excavation by reliance upon Major Morrow to protect against that danger. The person on whom the duty devolves is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures." See, also, Colvin v. Powell & Co., *supra.*

Chemical corporation complains that an instruction given the jury told it that one of the issues was whether the chemical corporation was negligent without limiting it to the negligence specified by appellees. The immediately following instruction told the jury that the burden of proof was on plaintiffs (appellees) to prove by a preponderance of the evidence the material allegations of their amended petition (which were recited in a prior instruction) and any negligence of the defendants (appellants) or one of them as charged in the amended petition, and that such negligence was the proximate cause of the damage claimed. Instructions must be considered as a whole and when this is done, if they fairly state the rules of law applicable to the case, that is all that is required. The objection to the instruction is not well taken.

The trial court in substance told the jury that if a manufacturer offers to the public an insecticide it in

effect represents that the insecticide is suited for the purpose for which it is represented and labeled and for which it is sold, and any dealer, purchaser, or user may rely upon such representation. The condemnation of the instruction by chemical corporation is that it submits an issue not in the case. Appellees charged air service contracted to spray the sugar beets of appellees and to perform the contract air service purchased from chemical corporation an insecticide represented to be Toxaphene by labels on the container in which the chemical was contained but that the chemical was not as represented but contained 2,4-D, a chemical injurious to sugar beets with which the beets of appellees were sprayed and destroyed. These allegations were substantially denied by chemical corporation. The objection to the instruction is not justified.

Air service contests the correctness of an instruction in substance that if the jury found from a preponderance of the evidence that air service failed to use ordinary care and negligently allowed the insecticide used by it to spray the beets to be contaminated with 2,4-D sufficient to injure them and that it was the proximate cause of their destruction, then the verdict should be in favor of the appellees and against the air service. The basis of this challenge is that air service asserts that there is no evidence of negligence by it. The record contradicts this conclusion. There is proof of circumstances from which it could be concluded that air service was responsible for contamination of the spraying solution. In any event it is certain that the obligation of the air service was to spray the beets with Toxaphene only and admittedly it sprayed them with 2,4-D and destroyed them. In the circumstances the instruction was not incorrect and it assuredly was not prejudicial. The submission of the case to the jury by the trial court was not prejudicial to either of the appellants.

The judgment should be and it is affirmed.

AFFIRMED.

E. EARL BAILEY, SPECIAL ADMINISTRATOR OF THE ESTATE OF NOLA BAILEY, DECEASED, APPELLEE, V. MERLE C. KARNOPP, SHERIFF OF LANCASTER COUNTY, NEBRASKA, APPELLEE, ROBERT METCALF, SPECIAL ADMINISTRATOR OF THE ESTATE OF THOMAS M. BENTLEY, DECEASED, INTERVENER-APPELLANT.

ZILAH M. POWELL ET AL., APPELLEES, V. GOLDIA A. BENTLEY ET AL., APPELLANTS.

104 N. W. 2d 417

Filed July 22, 1960. No. 34751.

1. **Continuances: Appeal and Error.** A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed.
2. **Appeal and Error.** The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
3. ———. In such a case, it is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
4. ———. In considering the sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and he must have the benefit of every inference reasonably deducible from the evidence.
5. **Trusts.** To establish a resulting trust the evidence must be clear, satisfactory, and convincing.
6. ———. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
7. **Adverse Possession.** The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years.
8. ———. The payment of taxes is an element and circumstance which may be considered together with all of the other circumstances of the case with respect to the subject of adverse possession.
9. **Appeal and Error.** Actions in equity, on appeal to this court,

are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite.

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Barney, Carter & Buchholz and *Chauncey E. Barney,* for appellants.

Max Kier, for appellees.

Heard before MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

MESSMORE, J.

There are two cases involved in this appeal. The first is a replevin action brought by E. Earl Bailey, special administrator of the estate of Nola Bailey, deceased, against Merle C. Karnopp, sheriff of Lancaster County, involving certain personal property taken into possession by said sheriff. Robert Metcalf, special administrator of the estate of Thomas M. Bentley, deceased, intervened in the replevin action. The sheriff filed a disclaimer of any right or interest in the property involved in the replevin action at the time of trial of such action. The second case is an action in equity brought by Zilah M. Powell and E. Earl Bailey as plaintiffs, against Goldia Bentley, a widow, Lulu Blue and Terry E. Blue, wife and husband, Lucille Yeany and Fred W. Yeany, wife and husband, Louise Busefink and Herbert Busefink, wife and husband, and Lucy Madden and John Madden, wife and husband, to quiet title to certain real and personal property known as the Lone Oak cafe, alleged to have been owned by Nola Bailey at the time of her death.

By stipulation of the parties, the two actions were consolidated for trial and appeal. A jury was waived in the replevin action and the trial had to the court.

In the replevin action the court found that the property described in the plaintiff's petition was the property of Nola Bailey, deceased, at the time of her death; that the right of possession of said personal property when this action was commenced was in the plaintiff and assessed the plaintiff's damages in the amount of one cent; and rendered judgment in accordance with the findings.

In the action to quiet title, the court found generally in favor of the plaintiffs and against the defendants; that the allegations of the plaintiffs' petition were true; that the plaintiffs were the owners in fee simple of Lot 27, Irregular Tracts in Section 26, Township 10 North, Range 5 East of the 6th P.M., in Lancaster County; that the plaintiffs were the sole and only heirs of Nola Bailey, deceased; that Nola Bailey was the owner in fee simple of the premises above described at the time of her death; and that Nola Bailey died intestate and the title to the real estate vested in the plaintiffs in equal shares. The court further found that Goldia Bentley was a widow, and the defendants Lulu Blue, Lucille Yeany, Louise Busefink, and Lucy Madden were her daughters; that Goldia Bentley was the widow of Theodore M. Bentley, deceased, and the above-named defendants were his daughters; and that said defendants had asserted a claim and interest in the real estate above described and that said claims were groundless and without color or merit. The judgment makes reference to the other defendants who are the husbands of the daughters and who have no interest in the title to this real estate. The court further found that the plaintiffs and their predecessor in title had been in open, notorious, exclusive, continuous, and adverse possession of said real estate for more than 10 years immediately prior to the commencement of this action and during all of said time asserted title to said premises against all persons whatsoever, including Theodore M. Bentley, deceased; and that Theodore M. Bentley, deceased, had disclaimed all right, title, and

interest in said premises by virtue of an affidavit duly filed in the office of the register of deeds in Lancaster County. The court further found that the depositions of Henry A. Van Aelst and Leona M. Van Aelst were taken by the defendants during the trial of this action and subsequently offered in evidence and found the same to be inadmissible, but that the court had reviewed the testimony tendered therein and found that even if said depositions were to be received in evidence, the court's finding generally in favor of the plaintiffs and against the defendants would still prevail. The court rendered judgment in accordance with the findings.

The defendants moved the court to vacate its decision and grant the defendants a new trial. The court overruled the defendants' motion for new trial and the defendants perfected appeal to this court.

The petition in replevin alleged that Nola Bailey, deceased, at the time of her death was the owner and in possession of certain personal effects described in the petition, which were taken into possession by the sheriff. The plaintiff prayed for return of the goods and chattels or for the value of the same.

The petition in intervention in the replevin action alleged that Theodore M. Bentley, deceased, was a resident of Lancaster County at the time of his death; and that the petitioner, as special administrator of the estate of Theodore M. Bentley, was entitled to and required to take into possession all of the personal property belonging to and owned by Theodore M. Bentley at the time of his death. The petition in intervention then described the property the same as appears in the plaintiff's petition in replevin. The petition further alleged that E. Earl Bailey and the sheriff wrongfully detained and kept said personal property from the petitioner in intervention. The prayer was for judgment against the plaintiff, E. Earl Bailey, and Merle C. Karnopp, sheriff, for the return and delivery of said property as described in the petition in intervention, and for costs.

At this point it is noted that throughout the record Theodore Milton Bentley is referred to as Thomas Bentley, T. M. Bentley, or Tom Bentley. We will refer to Theodore Milton Bentley as Tom Bentley or, as occasion requires, by his other names, and to the other parties as they are designated in the district court or on occasions by their names as the same may be required.

In the suit to quiet title, the petition of the plaintiffs Zilah M. Powell and E. Earl Bailey against the defendants above set forth, alleged that the plaintiffs were the owners in fee of Lot 27, Irregular Tracts in Section 26, Township 10 North, Range 5 East of the 6th P. M., in Lancaster County; that the plaintiffs were the sole and only heirs at law of Nola Bailey, deceased, being the daughter and son of the said deceased; that Nola Bailey was the owner in fee of said premises, and died on August 27, 1958, intestate; and that the title to said real estate thereupon vested in the plaintiffs, an undivided half interest therein to each of the plaintiffs. The petition then identified the defendants and their relationship to Tom Bentley, deceased, and stated that said defendants asserted and claimed an interest in the real estate herein described, which claims were false and without color or merit. It was further alleged that Nola Bailey was seized in fee of said premises by virtue of a deed of record; that Tom Bentley, deceased, in his lifetime, by affidavit duly filed of record, stated that he had no interest in said premises; that none of the defendants had any right, title, or interest in said real estate; and that by virtue of the facts above set forth there was a cloud cast upon the title of the plaintiffs to the real estate and the plaintiffs' use thereof. The prayer of the petition was that title be quieted and confirmed in the plaintiffs as against each of said defendants; and that defendants be enjoined forever from asserting any claim of interest in said real estate or in any portion thereof.

The defendants, by answer, denied each and every

allegation contained in the plaintiffs' petition; and alleged that the true owners of the real estate described in such petition were the sole and surviving heirs of Tom Bentley.

The defendants filed an amended answer and cross-petition. The amended answer denied each and every allegation of the plaintiffs' petition. The cross-petition alleged that from 1939 and until the time of his death, the true, beneficial, and equitable ownership of the real estate described in the plaintiffs' petition was at all times vested in Tom Bentley, deceased; that Nola Bailey's interest was a bare legal title; that Tom Bentley died intestate on August 27, 1958; that thereupon ownership of said real estate vested in the manner provided by law in his sole and surviving heirs, naming them; that until his death, Tom Bentley operated upon the premises here involved a business known as the Lone Oak cafe and owned all of the fixtures, equipment, and personal property used in the operation of said business; and that upon his death such property also descended to his heirs at law, but the plaintiffs wrongfully had possession of the same. The prayer was that the legal and equitable title to the real estate be quieted in the heirs of Tom Bentley, and that the title to the personal property be likewise quieted in them.

The plaintiffs replied to the amended answer, denying each and every allegation therein contained not admitted by the plaintiffs' petition. In answer to the defendants' cross-petition the plaintiffs denied all of the allegations therein contained except such as admitted the allegations of the plaintiffs' petition. Further answering defendants' cross-petition, the plaintiffs alleged that they and their immediate predecessor in title, to wit, their mother, Nola Bailey, deceased, had been in open, exclusive, and adverse possession of the premises described in the plaintiffs' petition for more than 10 years prior to the commencement of this action and that they and their immediate predecessor in title had been

seized of legal title to the said premises for more than 10 years; and specifically denied that Tom Bentley had any interest, legal or equitable, in said premises during the 10-year period prior to the commencement of this action. The plaintiffs further alleged that their predecessor in title, Nola Bailey, deceased, acquired legal title to said premises on June 4, 1945; that she was in possession thereof until the date of her death; and that the plaintiffs had been in possession thereof subsequent to her death. The plaintiffs specifically denied that Tom Bentley had any interest in said premises at the time of his death. The plaintiffs affirmatively alleged that Tom Bentley disclaimed any interest in the premises in an affidavit recorded April 14, 1952, in which he stated that he claimed no right, title, or interest in and to said premises heretofore mentioned, or the buildings and improvements thereon. The plaintiffs further alleged that defendants were charged with notice of said affidavit, the same being a matter of record since April 14, 1952, and said defendants were estopped to deny the truth of the affidavit. The plaintiffs further alleged that Nola Bailey, subsequent to the year 1945, dealt with said property as her sole and exclusive property, paid the taxes thereon, operated a business thereon, employed help, including Tom Bentley, paid wages and social security for and in behalf of said help, including Tom Bentley, paid real estate taxes, and filed income tax returns; that as her successors in interest, plaintiffs were vested with the title to the real estate, together with all improvements thereon; and that defendants had no interest therein. The plaintiffs' prayer was the same as in their petition.

The defendants and intervener set forth a great number of assignments of error in both actions which may be summarized as follows: The decision of the trial court was contrary to the evidence and the law; the trial court erred in failing to grant the defendants and intervener a continuance to prepare for trial; the trial

court erred in receiving in evidence certain exhibits; the trial court erred in not receiving certain evidence offered by the defendants and intervener; the trial court erred in failing to declare the existence of a resulting trust in favor of Tom Bentley, deceased; the trial court erred in failing to impose a constructive trust upon a part of the real estate involved; and the trial court erred in finding that the plaintiffs and their predecessors in title were in open, notorious, exclusive, continuous, and adverse possession of said real estate for the statutory period of time.

These cases as consolidated were set for trial on December 17, 1958, and continued to December 29, 1958. Prior to December 17, 1958, the defendants and intervener were represented by counsel who, due to a disagreement with them, withdrew from the case. Their present counsel entered his appearance in behalf of the defendants and intervener on December 17, 1958, and filed a written motion for a continuance. Proceedings were resumed on December 30, 1958.

The substance of the allegations of the defendants' motion for continuance may be summarized as follows. The defendants alleged that their present counsel was employed by them on December 15, 1958, by a long distance telephone call from Cleveland, Ohio; that he was informed that the case was set for trial on December 17, 1958; that present counsel for defendants had no previous acquaintance with the case and informed defendants that he was engaged as a hearing officer before whom depositions were being taken in an election contest which had been noted for hearing on November 24, 1958, and might continue until December 29, 1958; that counsel was urged by the defendants to take such employment, and he accepted; and that because of the shortness of time counsel would not be able to present a proper defense on behalf of the defendants and requested a continuance of 45 days.

To the defendants' motion for continuance, the plain-

tiffs filed objections which may be summarized as follows: That the case was originally set for trial by agreement of the parties on November 24, 1958, and a continuance was obtained until December 17, 1958; that the case had been fully investigated by a former agent of the Federal Bureau of Investigation for the defendants; that there was a substantial amount of property involved in this case; that the attempt on the part of the defendants' counsel to obtain a further continuance would cause other parties to lose substantial amounts of money; and that defendants' prior counsel were furnished certain documents pertaining to the ownership in the property involved in this litigation. Plaintiffs asked that a continuance be denied.

In addition, defendants' counsel testified with reference to why the defendants should be granted a continuance; that he learned on December 28, 1958, of certain material and competent evidence that could be given by nonresidents of the state which should be taken and presented in the trial; that the courthouse in Lancaster County was closed from December 24 until December 29, 1958, and he was unable to obtain admittance; and that there were several public records under the possession and control of certain county officials pertaining to this case.

On cross-examination counsel for defendants testified that he received a telephone call from one Wendell Sweet from Columbus, Ohio; and that he had previously talked to another person in Lincoln who stated that Sweet was a former Federal Bureau of Investigation agent and had asked this person about procuring counsel to represent the defendants. This witness further testified as to his engagement as a hearing officer in the election contest and the length of time he was required to perform such duties, and he so informed Mr. Sweet over the telephone. He further testified that he knew the case was set for trial on December 17, 1958; and that he knew defendants' former counsel had in-

vestigated the case, that Mr. Sweet had been in Nebraska many days investigating the case, and that he would receive the results of such investigation.

The trial court denied defendants' motion for continuance.

It appears from the record that this case was tried on various dates, beginning on December 17, 1958, and continuing on December 29 and 30, 1958, January 7, 8, 9, 21, 22, and 23, 1959.

"A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed." Freeman v. City of Neligh, 155 Neb. 651, 53 N. W. 2d 67. See, also, Vasa v. Vasa, 165 Neb. 69, 84 N. W. 2d 185.

In the absence of an abuse of discretion, a denial of a continuance does not constitute error. We conclude that the trial court did not abuse its sound legal discretion in denying the defendants a continuance.

With reference to the replevin action, we have heretofore set forth the judgment of the trial court respecting such action.

The record shows that Nola Bailey and Tom Bentley died by accidental asphyxiation in the early morning of August 27, 1958. The place of their deaths was in a cottage which they maintained as their household. The cottage was located on the same grounds as the Lone Oak cafe, west of Lincoln, on the highway just east of Emerald. A deputy sheriff, assisted by other officers and the county attorney, made an investigation at the time of the deaths. The property found in the cottage was taken into possession by the sheriff of Lancaster County and part of it, consisting of $1,116.59 in cash, a billfold, watch, and ring of keys was given to the special administrator of the estate of Tom Bentley. It is admitted by the parties that this special administrator is now the administrator of the estate of Tom Bentley, deceased. All of the personal property, except that

above described which was given to the personal representative of the deceased Tom Bentley, was turned over to E. Earl Bailey, the special administrator of the estate of Nola Bailey, deceased, who is now the administrator of such estate.

The property so taken was listed in three categories. One list was Nola Bailey's personal effects, and included $5,709.48 in cash, a safe deposit box key, diamond rings, and other items. Another list was property taken from a safe in the cottage, and included $79 in cash, an abstract and papers pertaining to the Lone Oak cafe, and several bundles of insurance policies. All of the articles turned over to Tom Bentley's personal representative came from his room in the cottage. The articles turned over to the personal representative of Nola Bailey, deceased, were taken from a locked safe in Tom Bentley's room and from various places in her room. All of the property taken by the sheriff and placed in his custody came from the cottage.

In Lewis v. Hiskey, 166 Neb. 402, 89 N. W. 2d 132, we held that: "The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.

"In such a case, it is not within the province of this court to resolve conflicts or to weigh evidence. If there is a conflict in the evidence this court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong." See, also, Grant v. Williams, 158 Neb. 107, 62 N. W. 2d 532; Plummer v. Fie, 167 Neb. 367, 93 N. W. 2d 26.

Further, in considering the sufficiency of the evidence to sustain a verdict or judgment rendered by a court in a case where a jury is waived, the evidence must be considered most favorably to the successful party, any controverted fact resolved in his favor, and

he must have the benefit of every inference reasonably deducible from the evidence. See, Granger v. Byrne, 160 Neb. 10, 69 N. W. 2d 293; Reynolds v. Knott, 164 Neb. 365, 82 N. W. 2d 568; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151.

From a review of the evidence pertaining to the replevin action, and in the light of the above authorities, we conclude that the judgment of the trial court rendered in the replevin action was proper.

This brings us to the action to quiet title which is triable de novo in this court.

Inez Shepard, a member of a firm of accountants, testified that she knew Nola Bailey during her lifetime, and also knew Tom Bentley. She produced certain records and federal income tax returns which showed partnership returns for the Lone Oak cafe business, made by Nola Bailey and Tom Bentley as partners for the years 1941, 1942, 1943, 1944, and 1945. In 1946 there was a difference in the income tax returns because two separate income tax returns were filed, Tom Bentley's income tax return referred to the operation of the Lone Oak cafe, and Nola Bailey's return reported the building and equipment, with the rent earned and the expense involved in its operation. In 1947, 1948, and at least a part of 1949, the same form of reporting income tax was made. On October 1, 1949, her firm was informed that the business of the Lone Oak cafe was sold to Nola Bailey. This required the issuance of a new social security number for Nola Bailey to be used from then on, and the Lone Oak cafe was operated as her business. After October 1, 1949, the Lone Oak cafe business was reported on income tax returns as a separate proprietorship in Nola Bailey. In 1950, Nola Bailey's income tax return was an individual return showing that she operated the business of the Lone Oak cafe as the sole proprietor. There was no record of an income tax return made by Tom Bentley in 1950. In 1951, the income tax return of Nola Bailey reported that she was the sole

proprietor of the Lone Oak cafe. The same type of income tax return was made by Nola Bailey in 1952, 1953, 1954, 1955, 1956, and 1957. All of such returns showed that she was the sole proprietor of the Lone Oak cafe. Tom Bentley reported wages that he received for working at the Lone Oak cafe, and the same years his wages were reported as an expense in Nola Bailey's income tax return. Tom Bentley was listed in the social security reports as an employee of Nola Bailey in returns made in 1953, 1954, 1955, 1956, and 1957. This witness further testified to an individual income tax return of Tom Bentley in 1954, wherein he gave his occupation as a cook at the Lone Oak cafe, and his total wages in the amount of $5,100. A deduction for his wages was reported in Nola Bailey's income tax return. An individual income tax return of Tom Bentley for 1955 shows the same source of income from his work at the cafe and the amount of gross wages received. A deduction for the same year was shown on the income tax return of Nola Bailey for the same year. In 1957, Tom Bentley made an income tax return showing his income from the Lone Oak cafe as an employee, and as such he received a salary and wages. This witness also testified to quarterly federal tax returns which were filed to report the deductions from employees' wages for social security and withholding tax. These quarterly returns began for the quarters ending September 30, 1953, through September 30, 1958. These returns showed the names and social security numbers of the employees of Nola Bailey doing business as the Lone Oak cafe during that period of time. In each instance the returns showed Tom Bentley's name and social security number and the amount of his wages. This witness also identified an employee's wage record sheet for Tom Bentley.

On cross-examination this witness testified that she was not sure how the information came to her attention in earlier years with reference to the matters handled by the firm for Nola Bailey and Tom Bentley.

However, in the latter years Nola Bailey would bring in her journal in which she had recorded cash disbursements and the record of her daily receipts, which account would be analyzed by the accounting firm and from which the quarterly statements were prepared. That was during the last 7 or 8 years. These records of Nola Bailey were in her own handwriting.

A clerk in the office of the county treasurer whose duties were to make out tax receipts, testified that he checked the records with respect to Lot 27 (the property described in the plaintiffs' petition) for the purpose of determining payment of taxes for the years from 1945 to date, and that all receipts for taxes were made to Nola Bailey.

There appears in the record an affidavit as follows: "State of Nebraska County of Lancaster SS: T. M. Bentley, being first duly sworn, upon his oath deposes and says: That he claims no right, title or interest in and to Lot 27 (formerly part of Lot 21), Irregular Tracts in the Northeast Quarter of Section 26, Township 10 North, Range 5, East of the Sixth P.M., Lancaster County, Nebraska, or the building and improvements thereon, and that the same is owned by Nola Bailey. (Signed) T. M. Bentley Subscribed and sworn to before me this 11 day of April, 1952. (Signed) Dale L. Young Notary Public Commission expires December 20, 1957."

There also appears of record a bill of sale dated October 3, 1949, from Tom Bentley to Nola Bailey, conveying his entire interest in the business of the Lone Oak cafe.

There appears in evidence what is entitled "Complete Release," signed by Goldia May Bentley before a notary public in Trumbull County, Ohio, dated December 1, 1955, which is in part as follows: "This agreement entered into this — day of July, 1955 by and between Thadore (sic) Milton Bentley of Lincoln Lancaster County Nebraska and Goldia May Bentley ne (sic) Scarberry, husband and wife of Girard Ohio, WHERE-

AS the parties have not lived together as Husband and wife for several years and it is their opinion they will not at any furture (sic) time, and are desirious (sic) of releasing each other of any or/and of all claims rights or title to any or all of their inheritances, holdings either in their personal or Real Property, and also of any claim or demand that either might have upon the other past present or future now and forwever (sic) Witness our hand and seal this day and year first above written." This was signed by Goldia May Bentley, but not by Tom Bentley.

The deputy clerk of the United States District Court testified to a complaint in the case of Nola Bailey, plaintiff, against George W. O'Malley, Collector of Internal Revenue for the District of Nebraska, defendant. It shows that the plaintiff in that action asserted title to the Lone Oak property. This action was filed on July 10, 1951. This matter was dismissed with prejudice, pursuant to a stipulation, each party to pay his own costs.

The county assessor of Lancaster County brought in records which comprised personal tax returns for the years 1950 through 1958, showing that Nola Bailey was the owner of the Lone Oak cafe.

The accountant was recalled and testified to an employee's wage record sheet pertaining to Tom Bentley for the year 1958. This document in Nola Bailey's handwriting was delivered by her to the accountant. This was a record of the wages paid and the withholding and social security deducted, from which the quarterly reports were made by the accountants. She testified that it was the same type of record Nola Bailey furnished relating to the same matters as previously testified to by her.

The county clerk of Lancaster County identified certain exhibits including an application made by Tom Bentley for a roadhouse or dancehall license for the Lone Oak cafe in 1957, and the same type of application made by Tom Bentley in 1958. These licenses were

issued to and paid for by Tom Bentley.

Earl Bailey testified that he was cashier of the Commercial Bank at Stratton, Nebraska; that Nola Bailey was his mother, and the mother of his sister Zilah Powell; and that his mother and father were divorced. He further testified that he had been acquainted with Tom Bentley for several years and knew him as head chef at the Lone Oak cafe; that the Lone Oak cafe was in his mother's name, that is, the restaurant business and the title to the personal property were in her name; and that he was familiar with the signature of Tom Bentley and would be able to identify his signature. This witness was handed an exhibit and identified the signature thereon as that of Tom Bentley. This document read as follows: "October 3, 1949. For and in consideration of ($1.00) one dollar and the complete cancellation of a debt contracted between myself as debtor, and Nola Bailey as creditor, I hereby sell and convey to her my entire ownership and claim of and on the business of the Lone Oak, operating as a restaurant and located 5½ miles west of Lincoln, Nebraska, on U. S. Hwy. #6;—Excepting:— That the Nebraska State Copyright of the name 'Lone Oak', which is registered in my name, shall remain my exclusive property. T. M. Bentley. Witness. Fayette C. Vergith."

This witness identified certain exhibits which were licenses for the sale of cigars, tobacco, and cigarettes, issued to Nola Bailey. In addition, this witness identified certain exhibits which were certificates of registration issued by the Director of the Department of Agriculture and Inspection of the State of Nebraska to Nola Bailey, granting her the right to operate a restaurant. This witness also identified a certain exhibit which was a list of insurance policies showing Nola Bailey as the insured. This witness also identified an exhibit which was the trademark registration of "Lone Oak," registered in the names of Nola Bailey and Tom Bentley. This witness further testified that he had visited the

Lone Oak many times, in 1946 and prior thereto, and there had not been a dancehall in the Lone Oak cafe since 1946 or 1947.

On cross-examination this witness testified that he had known Tom Bentley since around 1933, when Bentley was head chef at the Lone Oak cafe and his mother was cashier, directed the services in the dining room, and acted as hostess; that the Lone Oak was first operated in Emerald for 3 or 4 years, and in 1938 operated at its present location; that in 1944, it burned down and was rebuilt; and that he sold the real estate here involved and the personal property in the restaurant, and was required to furnish merchantable title under the terms of the contract.

The record of claims in the estate of Nola Bailey, deceased, and Tom Bentley, deceased, were offered and received in evidence to show the claims of the Lone Oak cafe against the respective estates. This record shows that the claims relating to the business of the Lone Oak cafe were filed in the Nola Bailey estate.

The evidence adduced by the defendants may be summarized as follows.

The register of deeds of Lancaster County identified an exhibit which is a contract of sale between Chester M. Fancher, a married man, and Inez Fancher, a single woman, made May 21, 1936, with Theo M. Bentley, and filed of record September 28, 1936. This witness further identified a mortgage from Nola Bailey to the J. H. Yost Lumber Company, dated July 2, 1945, signed by Nola Bailey and Tom Bentley, and a warranty deed from Henry A. Van Aelst and Leona M. Van Aelst, husband and wife, to W. J. Powell and Zilah N. Powell, sworn to before a notary public on June 24, 1941.

An employee in the office of the county treasurer testified that the records show the payment of real estate taxes on the Lone Oak property were receipted to Tom Bentley for the years 1936, 1937, and 1938; for the years 1939 through 1942, to Leona and Henry Van

Aelst; and for the years 1943 and 1944, to Tom Bentley.

The county assessor identified certain personal property assessments of the parties for the years of 1936 through 1949. These business property assessments show the schedules were made in behalf of Tom Bentley from 1936 through 1945. Beginning in 1946, the business property schedule was returned by Nola Bailey, and signed by Nola Bailey. From 1947 on, the business schedule returns were made by Nola Bailey. In 1954, the valuation of the Lone Oak real property was raised by reason of a general revaluation of Lancaster County real estate. Nola Bailey and Tom Bentley went together and complained about the taxes, objecting to the valuation placed on the Lone Oak property.

A witness who worked at the Lone Oak cafe testified that when she went to work, either the end of September or the first of October 1956, she was given instructions by Nola Bailey with reference to her work in the dining room, and was told that if anything was needed from the kitchen she should consult Tom Bentley. She also testified that Nola Bailey, Tom Bentley, and the help took their meals family style, and on one occasion in June or July 1958, one of the new waitresses called Tom Bentley Nola's husband. Nola said she "didn't have such a thing"; and that it was "much better to have a partner" and you could "buy him out or kick him out." There was a division of work between Tom Bentley and Nola Bailey, the latter had charge of the dining room and greeting the customers while the former had charge of the kitchen, and he also directed the waitresses in the dining room, decided when the place should close; took the waitresses home after their work; and paid for the gasoline out of his own pocket. When Nola Bailey made change, she used the cash drawer and the cash in her pocketbook interchangeably. This witness further testified that she observed Tom Bentley taking money from the cash drawer in May or June 1958, and loaning it to a person in Nola's presence; and that during the time

she worked at the Lone Oak, from 1956 to August 1958, Tom Bentley was present. He did no cooking in the kitchen, but usually sat in a booth or at a desk.

On cross-examination this witness testified that Nola Bailey gave her the slips for social security and withholding tax; that she was hired by Nola Bailey, worked for her, and was paid by her; and that she had a claim for wages which she filed in the Nola Bailey estate.

An employee of the Lone Oak cafe for 21 years testified that when she first went to work at the Lone Oak cafe in 1936 or 1937, Tom Bentley always took care of the kitchen and Nola Bailey the dining room; that after the place burned down in 1944, Nola Bailey told this witness "we" were building it; that when she returned to work in 1946, the division of work between Nola Bailey and Tom Bentley remained the same as when she first went to work; that she worked up until the time of the deaths of Nola Bailey and Tom Bentley; that while she worked at the Lone Oak, Nola Bailey made a special salad dressing which was sold at retail in the restaurant; and that the money received from these sales was kept separate because Nola Bailey said: "This is my money." On cross-examination this witness testified that she was always paid her wages in cash, by Nola Bailey, from the time she went to work at the Lone Oak until the time of the deaths of Nola Bailey and Tom Bentley; that Tom Bentley did not pay the waitresses, but on occasions when extra help was needed in the kitchen he paid such help; that after October 1949, Tom Bentley's name did not appear on anything insofar as her employment was concerned; and that she filed a claim for wages in the Nola Bailey estate.

Lucille Yeany, one of the defendants and cross-petitioners, testified that she lived in Cleveland, Ohio; that in 1930, the family of Tom Bentley lived in Girard, Ohio; that her father, Tom Bentley, was a traveling representative of a firm selling road machinery; and that he lived with the family until Decoration Day in

1933, when he left and came to Lincoln. She next saw her father in September 1939, when she brought her mother with her to endeavor to get funds from her father. Her father always corresponded with her up until the time of his death. She came on a visit to her father in the fall of 1942, in 1947, and with her husband and two sons in July and August 1955. They stayed in the cottage with her father and Nola Bailey for nearly 2 weeks. One night in a general family conversation, Nola Bailey told them how Tom Bentley had built the place, and how they both had worked to make it a success. Nola Bailey further said that she and the father of this witness had it fixed so that if anything would happen to her father, there would be funds available to buy out his heirs, and the same would be true if anything happened to Nola Bailey. This witness further testified that she and her two sisters and a nephew came to Lincoln August 28, 1958, after hearing of the deaths of their father and Nola Bailey; that they stayed in the cottage on the Lone Oak premises until September 5, 1958; and that Earl Bailey and his brother-in-law, Bill Powell, were staying in the cottage when they arrived. During the time they were there, this witness took her father's personal effects, which consisted of an assignment, a contract for the sale of the Lone Oak real estate from Leona M. Van Aelst to Theodore M. Bentley, receipts for payments by her father to Searle & Chapin Lumber Company, receipts showing payment of county taxes on the real estate for the years of 1936 through 1944, and a contract for the purchase of the Lone Oak property from the Fanchers, signed by Tom Bentley.

The secretary and treasurer of the Nebraska Central Building and Loan Association testified that his company made a loan of $10,000 on the Lone Oak property, secured by a mortgage dated June 6, 1945. He identified the loan application signed by Tom Bentley and Nola Bailey. He testified that according to the company check record the loan proceeds were distributed as fol-

lows: $3,000 to Nola Bailey on June 14, 1945; $4,000 to W. J. Powell on June 15, 1945; $1,500 to Tom Bentley on June 15, 1945; $1,031.34 to Van Sickle Glass & Paint Company; and the balance to insurance, abstracting, etc. The cleared check for $4,000 showed the endorsement of W. J. Powell. The application for the stock made in connection with the loan was made by Nola Bailey and signed by Tom Bentley and Nola Bailey. On cross-examination this witness testified that Nola Bailey was the "borrowing member" of the association to whom the loan of $10,000 was made. This loan was paid in 1947, and the abstract was delivered to the First National Bank.

In rebuttal, the president of the First National Bank identified certain entries made in the abstract relating to the Lone Oak real estate, including a mortgage of $13,000 showing a loan made to Nola Bailey; a mortgage for $9,500 secured by the Lone Oak property, the loan being made to Nola Bailey; a mortgage for $8,000 involving a loan made to Nola Bailey; and an entry on the abstract showing an affidavit of Tom Bentley, sworn to before a notary public on April 11, 1952, wherein he disclaimed any interest in the mortgaged real estate.

It appears from the record that one Chet M. Fancher, a married man, and Inez Fancher, a single woman, entered into a contract for the sale of real estate which included Lot 27, the Lone Oak property, to Theo M. Bentley, which was filed of record September 28, 1936, and that Lorene Fancher, wife of Chester M. Fancher, conveyed by quitclaim deed to Theo M. Bentley, the deed being dated September 21, 1936, and filed of record September 28, 1936, describing certain real estate including Lot 27, being the Lone Oak property. It also appears that Inez Fancher obtained a decree of divorce from Chester Fancher, the custody of their minor children and allowance for support money, attorney's fees, and costs, on December 11, 1933. An execution was issued on the real estate which included Lot 27, and

the property was sold to Henry A. Van Aelst and Leona M. Van Aelst, husband and wife as joint tenants with full rights of survivorship, which sale was confirmed and deed ordered. In conformity with this order, the sheriff of Lancaster County executed a deed to the Van Aelsts, dated May 20, 1940, and filed of record May 25, 1940.

It also appears from the record that there was an action to quiet title brought by the Van Aelsts, which included Lot 27, the Lone Oak property, and title was quieted in the Van Aelsts. Thereafter Henry A. Van Aelst and Leona M. Van Aelst executed a warranty deed to W. J. Powell and Zilah N. Powell involving real estate including Lot 27, the Lone Oak property. This deed was dated June 24, 1941, and filed of record April 25, 1945.

On June 4, 1945, W. J. Powell and Zilah N. Powell executed a quitclaim deed to Nola Bailey which conveyed to her the Lone Oak property. This deed was filed of record June 15, 1945.

A question arose during the progress of the trial with reference to the admissibility in evidence of the depositions of Henry A. Van Aelst and Leona M. Van Aelst. It appears that the trial court considered the evidence contained in these depositions. We have likewise examined the evidence contained therein and considered the same in this appeal. We will not set out this evidence because it would unnecessarily lengthen this opinion, and in any event it would not be sufficient to upset the findings and judgment of the trial court.

The defendants contend that there is either a resulting or a constructive trust established by the evidence in this case. We do not question the authorities cited by the defendants defining a resulting or constructive trust, nor the applicability of the authorities cited by the defendants relating to resulting or constructive trusts under the facts as shown in such authorities.

In Olsen v. Best, 167 Neb. 198, 92 N. W. 2d 531, this

court held: "To establish a resulting trust the evidence must be clear, satisfactory, and convincing * * *."

The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. See Musil v. Beranek, 160 Neb. 269, 69 N. W. 2d 885.

In the instant case the defendants have failed, the burden of proof being upon them, to show by clear, satisfactory, and convincing evidence that a resulting or constructive trust was established under the facts. Therefore, the defendants cannot prevail in this defense as contended for by them.

The defendants base their claim of title in part on an alleged defect in the execution of the deed which conveyed the property in question from Henry A. Van Aelst and Leona M. Van Aelst to W. J. Powell and Zilah N. Powell who later conveyed the property to Nola Bailey.

Section 76-258, R. R. S. 1943, provides: "When any instrument of writing, in any manner affecting or purporting to affect the title to real estate, has been, or may hereafter be recorded for a period of ten years in the office of the register of deeds of the county wherein such real estate is situated, and such instrument, or the record thereof, because of defect, irregularity or omission, fails to comply in any respect with any statutory requirement or requirements relating to the execution, attestation, acknowledgment, certificate of acknowledgment, recording or certificate of recording, such instrument and the record thereof shall, notwithstanding any or all of such defects, irregularities and omissions, be fully legal, valid, binding and effectual for all purposes to the same extent as though such instrument had, in the first instance, been in all respects duly executed, attested, acknowledged and recorded."

As heretofore stated, the deed from the Van Aelsts to the Powells was recorded on April 25, 1945, which

exceeds the statutory requirement of 10 years. The deed from the Powells to Nola Bailey was recorded June 15, 1945. It therefore appears that any possible defects in the execution of the deed herein mentioned would likewise be cured by the passage of the 10-year period, as provided for by the above-cited statute.

While we believe the evidence establishes that Nola Bailey was the owner of the Lone Oak real estate, the equipment in the restaurant, and the business of the Lone Oak cafe, however, assuming that the title to the real estate known as the Lone Oak was not in Nola Bailey, then it is apparent that she would have qualified as the owner thereof, as opposed to the defendants, under the rules of adverse possession.

In James v. McNair, 164 Neb. 1, 81 N. W. 2d 813, this court held: "The title to land becomes complete in the occupant by adverse possession when he and his grantors have maintained an actual, exclusive, open, and continuous possession thereof, claiming title to the same against all persons, for 10 years."

As stated in Frank v. Smith, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458: " 'The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious, and adverse possession thereof, claiming title to the same against all persons, for ten years.' Lantry v. Wolff, 49 Neb. 374, 68 N. W. 494."

In Ziemba v. Zeller, 165 Neb. 419, 86 N. W. 2d 190, this court held: "The payment of taxes is an element and circumstance which may be considered together with all of the other circumstances of the case with respect to the subject of adverse possession."

In Walker v. Bell, 154 Neb. 221, 47 N. W. 2d 504, this court said: "Payment of taxes by the occupant for a series of years is a strong circumstance, in connection with others, tending to show the adverse holding and the abandonment of the property by the holder of the title."

It is apparent from the record that Nola Bailey was in adverse possession of the premises known as the Lone Oak real estate for a period of 10 years prior to her death. She held herself out as the sole owner of the real estate and paid the taxes thereon, as shown by the record, and did so from the time she obtained title on June 4, 1945, until the date of her death, August 27, 1958.

The record discloses a complete estrangement between Tom Bentley and his family for many years. His widow had previously disclaimed any interest in any property that he might own. She purportedly signed a disclaimer of any interest that she might have in his property. While this document may be questioned as to its legality, it does tend to indicate the intention of Tom Bentley's widow as to what interest she might have in any property belonging to Tom Bentley.

The evidence discloses that Nola Bailey paid federal income taxes and kept social security records and withholding tax records of employees of the Lone Oak cafe; that the business returns for personal property with reference to the Lone Oak cafe were assessed to Nola Bailey and the personal taxes paid by her; and that Tom Bentley was in fact an employee of Nola Bailey and had no interest in the business except what wages he received as an employee. In this connection, we make reference to the evidence heretofore set out.

Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have adopted one version of the facts rather than the opposite. See Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699.

We find no prejudicial error in the record relating to the admissibility of evidence or the rejection of the

same, nor as to receiving in evidence certain exhibits, as contended for by the defendants.

In the light of the evidence and the authorities heretofore cited, we conclude that the judgment of the trial court should be affirmed.

AFFIRMED.

JAMES C. PETERS ET AL., APPELLANTS, V. WOODMAN ACCIDENT AND LIFE COMPANY, A CORPORATION, ET AL., APPELLEES.
104 N. W. 2d 490

Filed July 22, 1960. No. 34768.

1. **Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
2. **Corporations.** An officer or director of a corporation occupies a fiduciary relation to the corporation and to stockholders. He is treated by courts of equity as a trustee, and as such is ordinarily personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto.
3. ———. Within the limits of their authority officers and directors possess full discretionary power and in the honest and reasonable exercise of such power they are not subject to control by the stockholders or by the courts, at the instance of a stockholder. In the absence of usurpation, fraud, or gross negligence, courts of equity will not interfere at the suit of dissatisfied stockholders, merely to overrule and control the discretion of directors on questions of corporate management, policy, or business.
4. **Contracts: Fraud.** Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud.

5. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means.
6. ———. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury.
7. **Fraud.** Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him.
8. **Fraud: Equity.** Fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law. However, courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it. However, the proof must be sufficient to satisfy the conscience of the court that fraud is really existent, and to do this, it must be sufficient to overcome the natural presumption, which is always of considerable force, that men are honest and act from correct motives.
9. **Fraud.** To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. However, such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred.
10. ———. What constitutes fraud is a matter of fact in each case. Deception finds expression in such a variety of ways that courts have studiously avoided reducing its elements to positive definitions. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient.
11. ———. In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
12. **Witnesses: Evidence.** Where evidence of a witness' prior

evaluation of certain property, inconsistent with its present estimate, is introduced, the witness may explain the circumstances of his former evaluation and state why he now testifies differently.

APPEAL from the district court for Lancaster County: HARRY A. SPENCER, JUDGE. *Affirmed.*

Towle, Young & McManus, Max Kier, and *Janice L. Gradwohl,* for appellants.

Bert L. Overcash, Woods, Aitken & Aitken, and *Peterson & Ackerman,* for appellees.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiffs, James C. Peters, Ruth Tucker Newberg, Helen A. Adamson, and Arthur H. Newberg, brought this action as minority stockholders in Woodmen Central Life Insurance Company, for themselves and said company and all other stockholders thereof similarly situated, against defendants, Woodmen Accident and Life Company, a mutual insurance corporation, Woodmen Central Life Insurance Company, a stock corporation, and its named officers and directors. Plaintiffs sought thereby to obtain recovery of the value of an alleged agency force of Woodmen Central Life Insurance Company for which no consideration was included or paid under a reinsurance agreement whereby Woodmen Accident and Life Company, generally called Woodmen Accident, purchased the assets and reinsured the life and annuity contracts of Woodmen Central Life Insurance Company, generally called Woodmen Central. Plaintiffs alleged that officers of Woodmen Central were also officers of Woodmen Accident except Victor L. Toft and Ervin F. Rucklos, who were made directors of Woodmen Accident after the dissolution of Woodmen Central; that officers and directors of Woodmen Central and Woodmen Accident entered into a fraudulent plan,

scheme, and conspiracy to cheat and defraud plaintiffs and other stockholders, and pursuant thereto and by false representations believed by and relied upon by plaintiffs, defendants obtained the reinsurance agreement and thereby wrongfully appropriated the value of the agency force of Woodmen Central, causing its stockholders to be defrauded thereof, for the use and benefit of Woodmen Accident and other defendants.

Plaintiffs' prayer was for an accounting and for judgment in favor of plaintiffs on behalf of stockholders of Woodmen Central and said company for the alleged reasonable value of its agency force. In that connection, all defendants were served except defendant Joseph A. Spangler, and he is not primarily involved here.

Defendant Woodmen Central answered separately, denying that plaintiffs' action was for the use and benefit of it or any of its stockholders; admitting the sale of its assets and the reinsurance of its insurance in force; alleging that said reinsurance agreement was entered into freely and voluntarily by the parties thereto and for a full and adequate consideration; and alleging that said agreement was duly adopted and approved by its stockholders at a meeting thereof held on December 20, 1954, at which 17,784 shares out of a total of 19,491 shares outstanding, were represented in person or by proxy who unanimously approved said agreement. Said defendant also alleged that the agreement was a valid and binding obligation of the parties thereto, and that defendants never received from plaintiffs or from any other stockholders any demand to bring this action or any similar action prior to the filing of this action. Woodmen Central's prayer was for dismissal of plaintiffs' petition at plaintiffs' costs.

The answer of other defendants admitted execution of the reinsurance agreement and denied all plaintiffs' allegations of fraud and conspiracy. They alleged that plaintiffs and all other stockholders were completely and fully advised of the transaction before its consum-

mation; that there was no concealment or misrepresentation of any fact or information relating thereto; that complete records of Woodmen Central were open and available to plaintiffs at all times; that plaintiffs had a right and full opportunity to attend the business meeting of said company and cast their votes in person or by proxy concerning said transaction and otherwise protect their rights, if any; and that the price, terms, and conditions set forth in the reinsurance agreement represented the true, just, and fair value of all the assets involved, and reflected the sound business judgment of the respective parties based upon extensive study, consultation, and experience. Defendants also alleged that said agreement was unanimously approved by the directors of each company and was unanimously approved by the stockholders and policyholders present and represented by proxy at a meeting called for consideration of the agreement; that Woodmen Central, prior to 1936, was known as Cornbelt Life Insurance Company, which was in unsound financial condition and never became in such financial condition as would justify or permit distribution of earnings or surplus in the form of dividends to the stockholders. Defendants denied that Woodmen Accident appropriated an agency force of Woodmen Central, but alleged that it never had any separate agency force which was available and subject to appropriation by Woodmen Accident. Defendants specifically alleged that officers and directors of Woodmen Accident during 1954 and at the time of the reinsurance agreement transaction consisted of defendants Edwin J. Faulkner, Richard L. Spangler, and Walter S. Henrion, together with H. J. Requartte, Thomas C. Woods, Walter W. White, George P. Abel, Burnham Yates, and Thomas H. Wake; that with the exception of Edwin J. Faulkner, Richard L. Spangler, and Walter S. Henrion, none of said Woodmen Accident directors were officers, stockholders, directors, or otherwise interested in Woodmen Central; and that the negotiations and final

recommendations on behalf of Woodmen Accident with reference to said reinsurance agreement were carried on and concluded by a committee of said directors for Woodmen Accident, having no affiliation with or interest in Woodmen Central. Defendants also alleged that joint application for approval of the transaction was filed with the Department of Insurance on November 3, 1954; that said application was investigated by said department and staff and ordered approved on November 12, 1954, subject to approval at a meeting of stockholders and policyholders of the respective companies, which was done; and that no appeal was ever taken by anyone from the decision and order of said department.

Defendants further alleged that plaintiff Peters attended the annual meetings of Woodmen Central in 1955 and 1956, at which time minutes of special meetings of the company approving the reinsurance agreement and authorizing distribution of the assets in liquidation of the company were read and approved by him and other stockholders; and said plaintiffs are estopped from maintaining the action and plaintiffs' action is barred by laches. Defendants' prayer was for dismissal and recovery of costs.

Plaintiffs' replies were general denials. Interrogatories were submitted and answered. Plaintiffs then filed separate requests for admissions by defendants, some of which were objected to for reasons unimportant here, and some of which were denied or admitted in whole or in part, or qualified in material respects. Thereafter trial was had to the court whereat voluminous evidence was adduced by the parties and a judgment was rendered which found and adjudged the issues generally in favor of defendants and against plaintiffs, and dismissed plaintiffs' petition at plaintiffs' costs. The court therein specifically found and adjudged, as far as important here, that no fraud, deception, concealment, misrepresentation of fact, overreaching, plan, scheme, or conspiracy to cheat or defraud the stockholders of

Woodmen Central or the company existed or was practiced in connection with consummation of the reinsurance agreement; that prior to consummation thereof, plaintiffs, as well as all other stockholders of Woodmen Central, were given full and adequate information and notice concerning the proposed reinsurance agreement, including notice that no separate and additional amount was included in the consideration proposed in said agreement for an agency force of Woodmen Central; that at the time Cornbelt Life Insurance Company changed its name to Woodmen Central in 1936, it had ceased to write life insurance and had no agency force; that Woodmen Central never at any time thereafter had any agency force separate and apart from the agency force of Woodmen Accident; that after change of corporate name from Cornbelt Life Insurance Company to Woodmen Central in 1936, it used the agency force of Woodmen Accident in those states in which Woodmen Central was admitted to do business; that Woodmen Accident, at the time of the reinsurance agreement, had changed its corporate name to Woodmen Accident and Life Company; and that at time of consummation of the reinsurance agreement, Woodmen Accident already possessed the agency force being used by Woodmen Central, and there was no agency force deliverable by it to Woodmen Accident. The judgment also found that plaintiffs' ownership of stock in Woodmen Central represented only 30 shares of stock out of 19,491 shares outstanding; that individual defendants and associates owned 13,422 shares of the 17,784 shares voted in favor of the reinsurance agreement, said voted shares being all of the shares represented at the stockholders' meeting called to vote on said agreement; that plaintiffs' interest is so minimal that it could be reasonably assumed that the other stockholders were satisfied with fairness of the transaction; that plaintiff Peters was the only plaintiff who appeared at the trial and testified; that he owns 10 shares of stock in Woodmen Central and as a stockholder par-

ticipated in the subsequent 1955 and 1956 annual meetings of the stockholders at which minutes of the special meeting of the stockholders authorizing the reinsurance agreement were reviewed and unanimously approved without objection; and that Peters brought no action challenging the transaction until 22 months after the reinsurance agreement was approved by the Department of Insurance. The judgment further found that individual defendants would materially and substantially benefit financially only if the position of plaintiffs was correct and upheld, and a separate agency force value were added to the amount paid Woodmen Central.

Thereafter, plaintiffs' motion for new trial was overruled, and they appealed, assigning some 23 alleged errors, the substance and effect of which was to claim that the findings and judgment of the trial court were contrary to the evidence and law. We do not sustain the assignments.

We have examined the record in the light of rules hereinafter set forth. As reaffirmed in Pike v. Triska, 165 Neb. 104, 84 N. W. 2d 311: "Actions in equity, on appeal to this court, are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite."

This court has held that an officer or director of a corporation occupies a fiduciary relation to the corporation and to stockholders. He is treated by courts of equity as a trustee, and as such is ordinarily personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto. Whaley v. Matthews, 134 Neb. 875, 280 N. W. 159.

In Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393, we held: "Within the limits of their authority

officers and directors possess full discretionary power and in the honest and reasonable exercise of such power they are not subject to control by the stockholders or by the courts, at the instance of a stockholder. In the absence of usurpation, fraud, or gross negligence, courts of equity will not interfere at the suit of dissatisfied stockholders, merely to overrule and control the discretion of directors on questions of corporate management, policy, or business.

"A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.

"The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury.

"Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him.

"Fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law. However, courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it. However, the proof must be sufficient to satisfy the conscience of the court that fraud is really existent, and to do this, it must be sufficient to overcome the natural presumption, which is always of considerable force, that men are honest and act from correct motives.

"To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. But such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred.

"Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud.

"Fraud is never presumed and the party alleging and relying thereon must prove it. However, what constitutes fraud is a matter of fact in each case. Deception finds expression in such a variety of ways that courts have studiously avoided reducing its elements to positive definitions. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient."

Such opinion also held: "Transactions between corporations having common officers and directors are presumptively fraudulent and the burden is upon the defendants to sustain the transactions by clear and convincing evidence that they were fair."

We may assume for purpose of argument only that the corporations here involved had common officers and directors. However, such holding aforesaid means that the burden is upon defendants to go forward with the evidence after plaintiff has made a prima facie case and sustain that the transaction was fair, by clear and convincing evidence. In that connection, we held in Pike v. Triska, *supra:* "In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud."

In Price v. Fraser, 119 Neb. 806, 231 N. W. 18, this

court said: "While the court will closely examine for possibility of fraud transactions where the directors of a corporation which purchases property are also directors in the corporation which sells the same, such sale, however, is not unlawful and not void, but voidable only, and will be set aside only after a finding that the financial interest of such directors are such that they could not have honestly performed their duties as directors of the selling corporation. Such a sale will not, then, be set aside if made in good faith and for an adequate consideration. City Trust Co. v. Bankers Mortgage Loan Co., 102 Neb. 532; 14 C. J. 125; 7 R. C. L. 461, sec. 444."

The trial court in the case at bar found that: "* * * the individual defendants herein would materially and substantially benefit financially, if the position of the plaintiffs was correct and upheld * * *." In that connection, the trial court was correct, because the record discloses without factual dispute that if $167,259 for the value of Woodmen Central's alleged agency force was recovered by plaintiffs for themselves and said company, then the seven individual defendants herein would benefit generally in varying amounts, totalling $56,256.01, and other stockholders, members of their families, and business associates would benefit generally in the total amount of $58,918.18, making a total benefit of $115,174.19. In that situation, it would be entirely illogical to say that the financial interests of such defendants was such that they could not have honestly performed their duties as officers and directors in making and approving the reinsurance agreement, which deprived them of such benefits.

Woodmen Accident, now known as Woodmen Accident and Life Company, was a mutual insurance company organized in 1890. From 1915 to 1954 its corporate name was Woodmen Accident Company. It originally engaged in the sale of accident insurance, but sickness and life insurance has also been sold by it since 1954 when its corporate name was changed to Woodmen

Accident and Life Company, and as such it is a defendant herein.

Woodmen Central Assurance Company, a mutual insurance company hereinafter called Woodmen Assurance, was organized in 1916 under the name of Central Health Company. It originally engaged in the sale of sickness insurance and sold life insurance since 1944. Its corporate name was amended to be Woodmen Central Assurance Company some years prior to its merger with Woodmen Accident and Life Company, effective December 31, 1954.

Cornbelt Life Insurance Company, a stock insurance company, was organized prior to 1932 and engaged in the sale of life insurance wholly within the State of Nebraska until 1936. It was then reorganized by A. E. Faulkner and associates, who became stockholders, but its corporate name was changed to Woodmen Central Life Insurance Company, and it was admitted in nine additional states in which Woodmen Accident was already admitted and had established an agency force who were selling accident insurance for Woodmen Accident and sickness insurance for Woodmen Assurance. Prior to its reorganization in 1936, Cornbelt Life Insurance Company had been in serious financial difficulty. Its surplus was impaired; it had no agents for sale of insurance; and it had actually ceased to sell insurance by direction of the Nebraska Department of Insurance. Following the addition of $73,000 of capital through A. E. Faulkner and associates and others, and the change of the name from Cornbelt Life Insurance Company to Woodmen Central Life Insurance Company, the Woodmen Accident Company permitted it to jointly use the agency force of Woodmen Accident together with Woodmen Assurance in states where Woodmen Central had entered to sell life insurance. On December 31, 1954, the life insurance in force with Woodmen Central was reinsured with Woodmen Accident under a reinsurance agreement, and Woodmen Central retired

from business and was dissolved by vote of its stockholders. Plaintiffs and the individual defendants are stockholders in Woodmen Central, which is also made a defendant herein. The primary controversy in the trial court and here is whether or not a value of $167,259 for alleged agency force of Woodmen Central should have been included in the purchase price fixed in the reinsurance agreement.

Defendants Edwin J. Faulkner, president, Richard L. Spangler, secretary, and Walter S. Henrion were officers and directors of Woodmen Central and at the same time were officers and directors of Woodmen Accident. Defendants Richard W. Faulkner and Joseph A. Spangler were directors of Woodmen Central and of Woodmen Accident. Defendants Victor L. Toft and Ervin F. Rucklos were not directors of Woodmen Accident but were officers and directors of Woodmen Central, and in February 1955, after its dissolution, they became directors of Woodmen Accident, but that is not controlling here. See Rettinger v. Pierpont, *supra.*

Plaintiffs are stockholders in Woodmen Central and own a total of 30 shares out of 19,491 shares of stock outstanding. Plaintiff Peters, the only plaintiff who appeared at the trial and testified, owned 10 shares, and other plaintiffs owned 20 shares. The individual defendants, their families, and associates owned 13,422 shares of stock in Woodmen Central, and if the sum of $167,259 as value of agency force had been added to the consideration paid by Woodmen Accident to Woodmen Central, then $115,174.19 of that amount, or $8.581 per share would have been added to the liquidation value of stock owned by defendants, their families, and associates, with only $257.43 added to the liquidation value for the total of 30 shares owned by plaintiffs.

For a number of years prior to 1954, Woodmen Assurance, Woodmen Central, and Woodmen Accident, as separate legal entitles, operated under an arrangement known as "Woodmen Group," under which they oc-

cupied offices in the same office building, but generally the combined personnel, equipment, and facilities operated on a functional basis. Expenses identified as that of a company were separately charged and paid directly by that company. Other expenses for the joint benefit of any two or all said companies were apportioned on an equitable basis. Salaries of officers were separately fixed and paid by each company. The same agents sold for all three companies but were licensed separately to write insurance for each company which paid the commissions and renewal commissions of such agents and contributed its proportionate share of their expenses.

However, in the 10 states in which Woodmen Central was admitted to sell insurance within 1 year after its reorganization in 1936, Woodmen Accident had 745 licensed agents. Of this number, Woodmen Central initially chose to license 303 of such agents to also write life insurance in those states. Its agents continued to write accident and sickness insurance for Woodmen Accident and Woodmen Assurance. About 18 years later, on December 31, 1954, when Woodmen Central reinsured its life insurance with Woodmen Accident, Woodmen Central had 321, or about the same number of agents licensed to write life insurance for it. Those agents were the same agents as had been licensed for selling accident and sickness insurance for Woodmen Accident and Woodmen Assurance, now merged and known as Woodmen Accident and Life Company. The principal earnings of such 321 agents in 1954 came from commissions earned from the sale of accident and sickness insurance as agents of Woodmen Accident and Woodmen Assurance. Some 53 of its agents had no earnings whatever in 1954 from Woodmen Central; 231 had total earnings of less than $600 in 1954 from Woodmen Central; and only 15 had total earnings of $3,000 or more in 1954 from Woodmen Central. All but 2 of those 15 were agents for Woodmen Accident prior to commencing the sale of insurance for Woodmen Central in 1936. In

the year 1954, Woodmen Accident issued 39,415 policies, or 91.36 percent, and Woodmen Central issued 3,724 policies, or 8.64 percent. The principal income from Woodmen Accident in 1954 was $7,670,701, or 82.06 percent, and from Woodmen Central was $1,677,016, or 17.94 percent. Such figures as to Woodmen Accident also include the policies issued and premiums received by Woodmen Assurance, in view of the fact that the merger of those two companies did not occur until December 31, 1954.

Early in 1954, preparatory steps were taken with a view to reorganization of the three Woodmen insurance corporations, and a contract was let for the construction of a new home office building. Measures were taken to effect the consummation of a merger between Woodmen Accident and Woodmen Assurance, and same was consummated under the name of Woodmen Accident and Life Company. At about the same time, preparations were made for the consummation of a reinsurance agreement between Woodmen Accident and Woodmen Central, which transaction is directly involved here.

In that connection, on December 31, 1936, Woodmen Central had a surplus deficit of $34,797.61, if provision were made for surplus notes, and in each year thereafter until December 31, 1948, said company continued to show a year-end surplus deficit after provision for surplus notes. A true surplus commenced to accumulate in 1949, but only reached an amount of any consequence when in the fall of 1953 surplus noteholders surrendered their notes for conversion into common stock of Woodmen Central, in conformity with options in said notes. Even then, Woodmen Central's surplus account was not sufficient to enable the company to be admitted in a number of states. In view of the company's surplus condition, no dividends were ever declared on the stock of Woodmen Central from 1936 through 1954, and evidently none could be declared in the near future without risk to financial soundness of

the business. Thus, many stockholders desired to be paid for their stock and use the money for their own enterprises. Sale of insurance by the company had declined substantially through each year of 1952 to 1954, inclusive. Rates and mortality tables had been changed, and competition became more intense. Also, the close relationship between the two mutual companies and Woodmen Central required a precise and careful allocation of expenses which otherwise was not acceptable to the insurance departments of some states. For such reasons, the directors of Woodmen Accident established a director's committee on March 4, 1954, hereinafter called "Requartte committee" for reorganization, with instructions to investigate the possibility and feasibility of making an offer to reinsure Woodmen Central's life insurance and evaluate its assets in order to consummate a reinsurance agreement whereby Woodmen Accident would reinsure Woodmen Central's insurance and said company would be dissolved. The Requartte committee consisted of H. J. Requartte, a lawyer with many years of legal, executive, and business experience in the insurance field; Burnham Yates, president of the First National Bank in Lincoln, with many years of experience in investment fields; George P. Abel, with many years experience in the building, material, construction, and insurance business; Thomas C. Woods, a lawyer with many years of experience in the legal, insurance, and business field; Walter W. White, a lawyer who was publisher of the Lincoln Star and had a wide experience in the business field including the purchase and merger of corporations; and Thomas H. Wake, president of Jones National Bank in Seward. Such committee consisted of more than a clear majority of the board of directors of the Woodmen Accident, and did not include any person who had any interest in or who was either an officer, director, or stockholder in Woodmen Central. At a later date the directors of Woodmen Central appointed a committee consisting of Victor L.

Toft, a businessman with many years of experience in the insurance field, who had full knowledge of Woodmen Central's affairs ever since it began operations in 1936, and Ervin F. Rucklos, a lawyer with years of experience in the insurance and business field. Neither Victor L. Toft nor Ervin F. Rucklos had any financial interest in or was either an officer or director of Woodmen Accident. The purpose of such committee was to study and consult with each other and the Requartte committee with regard to said proposed reinsurance agreement, and to assist in determining whether such agreement should be approved and accepted by Woodmen Central's stockholders. All of the committeemen aforesaid will be called by their last names.

Requartte was elected chairman of Woodmen Accident's reorganization committee but became ill in August 1954, and Yates became acting chairman. Prior thereto, such committee had largely completed certain of its purposes, including the merger of Woodmen Accident and Woodmen Assurance, and the change of Woodmen Accident's corporate name to Woodmen Accident and Life Company, and an enlargement of its powers to engage in the life insurance business. In addition, Mr. Haight, an Omaha consulting insurance actuary, had been employed by the Requartte committee and had made studies connected with valuation of the affairs and life insurance business of Woodmen Central. His basic valuation, which did not include any separate allowance to be made or paid for an agency force of Woodmen Central, had been mailed to Requartte on May 25, 1954, and Requartte on June 4, 1954, had mailed a copy of Haight's report thereof to one Tiffany, a Chicago consulting insurance actuary, for analysis and comment. Such analysis and comment by Tiffany on Haight's valuation was mailed back to Requartte on August 13, 1954. Tiffany's formula for the valuation was somewhat different from that of Haight and it recommended placing a valuation on an agency force of Woodmen Central. On

September 8, 1954, Yates, as acting chairman of the Requartte committee, arranged a conference in Chicago with Tiffany and Haight to consider and discuss Haight's basic valuation study of May 25, 1954, and Tiffany's comment and report thereon of August 13, 1954. At that time, Yates was not informed of the true facts with relation to Woodmen Central's agency situation, and no information was furnished Tiffany or Haight with regard thereto. Thereafter, on September 11, 1954, Yates wrote Tiffany to confirm his understanding of the discussion at the Chicago meeting, and Tiffany verified same by letter September 17, 1954. Yates' letter, as summarized, stated that Haight had not included anything in his calculations as a valuation for a Woodmen Central agency plant, but Tiffany seemed to feel that it would be proper and desirable to include same, and that failure to do so might be a weakness in the transaction. Haight, upon his return from Chicago, prepared a memorandum to Yates in which he theorized upon values that might be added if an agency force value was to be included, as suggested by Tiffany.

Yates then wrote to H. Lewis Reitz, Raymond R. Haffner, and B. B. Gribble, hereinafter called by their last names, all of whom were expert insurance actuaries or executives with different insurance companies, inviting them to come to Lincoln for a conference with the Requartte committee and Haight on September 20, 1954, in conformity with prior arrangements theretofore made by president Edwin J. Faulkner. Prior to coming to Lincoln, various studies and reports, including those of Haight and Tiffany, were sent to such actuaries, who studied them, then attended a September 20, 1954, meeting with Yates, Abel, Wake, and Haight. Thereat certain changes were agreed upon and embodied in a letter from Haight to Yates dated September 21, 1954. There no information was made available to the actuaries with regard to Woodmen Central agency background and interrelation with Woodmen Accident and

Woodmen Assurance, and the valuation of agency force was made on the basis that would ordinarily be made for a company with an agency force of its own. Haight then made a revised valuation study dated September 30, 1954, to carry out conclusions reached by the consulting actuaries at their meeting on September 20, 1954, which reflected, among other revisions, a proposed value of $167,259 to be added for Woodmen Central agency force. That revised valuation study was presented to the Requartte committee, and Yates made a written report to the directors of Woodmen Accident on October 15, 1954, approving such revised valuation.

Thereafter, on October 25, 1954, members of the Requartte committee met with Haight and officers of Woodmen Accident, where Yates went over, step by step, the report and proposal developed as a result of deliberation with the consulting actuaries on September 20, 1954. When Yates reached the agency value proposal, a question was raised whether that was a proper value, that is, whether a value could properly be placed upon agency force. The officers of the Woodmen Accident pointed out the fact that agents licensed to place their life insurance with Woodmen Central were men who were Woodmen Accident agents; that they drew a majority of their earnings from that company, which had recruited and developed their opportunity to earn through such company; that they were all originally licensed to represent that company; that they regarded themselves as that company's agents; that it was impossible for Woodmen Central to give Woodmen Accident that which it already had; and that under the circumstances, Woodmen Central would not have been able to deliver the services of those agents to Woodmen Accident or to any other company. There Abel, a member of the Requartte committee, said: "We can't possibly include in this offer a separate consideration for agency plant," and after full discussion, with all present participating, it was unanimously concluded and

agreed that Woodmen Accident's offer should not include any separate value for agency plant.

In this trial, Yates testified that he had not consulted with any officers of either company prior to October 15, 1954, with regard to the subject matter of the committee's report of that date, and that after the explanation given at the October 25, 1954, meeting with reference to the agency situation, it was his business judgment and that of the rest of the committee, after hearing the facts presented, that they could not ascribe a value to agency plant and that he, Yates, could not in good conscience include any such value in the offer to Woodmen Central. White testified that it was his judgment that Woodmen Central had nothing to deliver to Woodmen Accident as an agency plant. Abel testified, "It occurred to me that they didn't have, the Woodmen Central Life didn't possess, anything that we already didn't have, and I didn't see how we could justify paying anying for it. * * * I made up my mind that they had nothing, the company they were going to buy, as far as the agency force was concerned didn't have anything that wasn't already possessed" by Woodmen Accident. It was then unanimously agreed that such was the fact and that no allowance should be included for agency force. Haight, the actuary, having attended that meeting and hearing the factual discussion and that decision, then agreed therewith.

At conclusion of the October 25, 1954, Requartte committee meeting, Yates prepared a "Memorandum for the File," which summarized at length the factual situation and disclosed the reasons for the decision made at such meeting that no value for agency plant could be included in Woodmen Accident's offer. The reasons in substance were that the agency organization of Woodmen Accident and Woodmen Central were identical in states where the latter operated; that Woodmen Accident could not appropriately assign a value to an agency plant of Woodmen Central when Woodmen Accident al-

ready enjoyed the representation of that same agency; that Woodmen Central had nothing to sell that Woodmen Accident did not already possess; and that a separate consideration to be paid for agency plant could not be supported.

In the afternoon of October 25, 1954, the Requartte committee held a special meeting in Requartte's home, where Yates, Requartte, Abel, Wake, and Woods were present, which constituted a quorum of the Woodmen Accident board, with all members of the Requartte committee present except White. There the proposed offer to purchase the furniture, fixtures, equipment, and supplies of Woodmen Central, and to reinsure its life insurance business without any separate allowance or payment for agency force, was authorized to be made to Woodmen Central. A copy of the minutes of such meeting appears in the record.

After March 4, 1954, when the Requartte committee was appointed, Toft and Rucklos, who later became members of Woodmen Central's reorganization committee, were kept informed of the developments regarding valuation studies of the life insurance business of Woodmen Central. On October 18, 1954, the president of the company wrote them that there would be a formal proposal made of a reorganization agreement by Woodmen Accident, which should be considered by them as a committee not later than Tuesday, October 26, 1954. Toft and Rucklos had no connection officially or otherwise with Woodmen Accident, and as a committee for Woodmen Central they were to make recommendations to a meeting of its board of directors scheduled for 3 p. m., October 26, 1954. Within a day or two after October 18, 1954, Toft and Rucklos had received for examination and study, and had studied, every document, including every report, letter, and memorandum pertaining to values, including agency force, which had been in the hands of the Requartte committee and Woodmen Accident between May 25, 1954, and September

30, 1954; and on October 25, 1954, they were notified of the decision made that day that the offer to be made Woodmen Central did not include a separate consideration for agency force. Toft and Rucklos conferred over the telephone on October 22 and 25, 1954, and met for a conference at 2 p. m., October 26, 1954, to determine what their recommendation would be to the full board of Woodmen Central's directors with regard to Woodmen Accident's proposal. Following the conference, the entire board of directors of Woodmen Central met as scheduled at 3 p. m., on October 26, 1954, to consider the report of Toft and Rucklos, whereat among other documents the "Memorandum for the File" prepared by Yates, as heretofore mentioned, was presented and considered, and decision was made by the directors concerning the exclusion of any value for agency force. The proposed reinsurance agreement was also presented and discussed, together with a report of Toft and Rucklos, recommending acceptance of Woodmen Accident's offer, and the directors, with full knowledge of the facts, then unanimously voted to approve and accept Woodmen Accident's offer. In doing so, without including the separate amount of $167,259 for agency force, as had been earlier considered during negotiations, each director of Woodmen Central who had voted took a substantial reduction in the amount he would receive as a stockholder in Woodmen Central.

Toft had theretofore continuously served Woodmen Central since January 28, 1936, as an officer and director, and he had at all times since had full and accurate knowledge of the affairs of Woodmen Central during the succeeding years. He testified that in good conscience he could not approve that a value should be included for agency force which was of such a nature that it would be impossible to attach a value to it; that having lived with the situation for some 18 years, he was fully conscious of the exact nature of the agency force; that no agency force could possibly be delivered

to Woodmen Accident or to any other company; that he had a high regard for the integrity and judgment of Haight and Gribble, and faith and confidence in the business integrity and acumen of officers of the two companies; and that in view of the substantial stockholdings of officers and directors of Woodmen Central, it would be incredible that they should accept about $100,000 less than they could have received had their consciences permitted them to put a valuation on agency force. Upon being asked his reason for not employing other lawyers for the committee, he replied that it was a business matter and not a legal matter, and that he had every confidence in William Aitken with whom he had worked for some 18 years. In that connection, it will be remembered that Requartte, Woods, White, and Rucklos were also lawyers who gave their services during the transaction prior to this litigation, and that thereafter other counsel also appeared for different defendants whose interests plaintiffs claim were adverse. Toft was asked why the committee did not seek offers from other insurance companies. In such respect he testified, and his testimony is substantially corroborated, that shopping of an insurance company on the market is a very detrimental thing and most destructive of the integrity of such a company. Rucklos testified that he approved the Woodmen Accident offer without any value for agency plant because his opinion was that under the circumstances it had no agency which could be delivered to Woodmen Accident.

One Harold A. Reise, a consulting actuary of Chicago, testified in a deposition offered by plaintiffs that the agency force of Woodmen Central was unusually good from the standpoint of persistency; that in evaluating the assets of a stock life insurance company it was proper to place a separate value on its agency force; and that Haight's calculations contained in his later report were appropriate, but that his valuation of agency force at $167,259 was a minimum one. He testified that his in-

formation was obtained from a review of certain described documents and exhibits appearing in the record, interrogatories submitted, and answers thereto, and an examination of the 1957 edition of Best's Unique Manual Digest with reference to Woodmen Central's progress, capital surplus, and assets, but he admitted that nothing he learned therefrom entered into his judgment or opinion. It is sufficient to say that the exhibits and documents which he reviewed to arrive at his judgment or opinion therein did not disclose the background of the agency situation and relations heretofore set forth.

Reitz, an insurance executive from Houston, Texas, called as a witness by defendants, testified that in his original consideration of a value for agency force on September 20, 1954, he had not been furnished information with regard to the background of the agents or agency force, the method of licensing agents, or their relation with Woodmen Accident, and other facts pertaining thereto; that his suggested valuation of agency force made at the conference with Haight, Haffner, Gribble, and Yates on September 20, 1954, was made on the basis that Woodmen Central had an independent agency organization which was its property; and that having received a copy of the "Memorandum for the File" from Woodmen Accident, which disclosed that its committee had excluded a separate agency force valuation and given reasons therefor, he agreed with the conclusions therein, and said, "Well, as it is outlined here in the light of these circumstances, I think the valuation committee was correct in omitting a valuation for agency organization."

Haffner, an insurance actuary, called as a witness for defendants, testified that at the initial conference of September 20, 1954, they made the valuation on the basis that would ordinarily be made for a company with an agency plant of its own, but that having been in the courtroom and heard the facts, and having read the "Memorandum for the File" dated October 25, 1954,

he agreed with the report, the opinion given by Reitz, and the judgment of the Requartte committee and the board of directors of Woodmen Central that a separate valuation for agency force should be excluded. In other words, he testified that he had changed his original opinion as expressed in the September 20, 1954, conference report, after additional facts became known to him during the trial.

Gribble, an insurance actuary called by defendants, also testified that he had no information as to the background and relations with regard to the agency force on September 20, 1954, and that with such additional facts made known to him during the trial, including the "Memorandum for the File" on October 25, 1954, he approved and agreed with the conclusions that value for agency force should not be included in Woodmen Accident's offer. Plaintiffs attempted to impeach his testimony in rebuttal, but his credibility was a question for the trial court.

On November 3, 1954, a joint application was filed by Woodmen Accident and Woodmen Central with the Department of Insurance seeking approval of their reinsurance agreement. A copy thereof, together with certified copies of resolutions of the board of directors of each company authorizing such action and approving the agreement, were attached to the application. On or about the same date, copies of every document or memorandum, including all correspondence that in any way related to the insurance transaction and the manner in which the purchase price was arrived at, all of which we have heretofore mentioned, were delivered to and filed with the Department of Insurance in support of such joint application.

The Director of Insurance then caused an investigation and examination to be made and assigned two department actuarial examiners to investigate the value of the insurance and assets of Woodmen Central. They did so and made a report thereof to the Director on

November 10, 1954, wherein they approved the proposed reinsurance agreement.

On November 12, 1954, thereafter, the Director signed an order approving the proposed reinsurance agreement, subject to the approval of the policyholders of Woodmen Accident and the stockholders of Woodmen Central, at meetings to be held by them for the purpose of considering the proposed reinsurance agreement.

On December 21, 1954, the Director filed a supplemental and final order finding that approval had been made by the policyholders of Woodmen Accident and the stockholders of Woodmen Central, as required in his order of November 12, 1954, and that the reinsurance was effective in accord with its terms. No appeal was taken either from the order of November 12, 1954, or from the order of December 21, 1954, made by the Director of Insurance.

In that connection, on November 19, 1954, the president of Woodmen Accident wrote and mailed postpaid, a letter to every stockholder of record in Woodmen Central, notifying them that there would be a special meeting of such stockholders on December 20, 1954. A copy of the original order of the Department of Insurance, the reinsurance agreement, and a form of proxy were enclosed. The president's letter contained detailed information concerning the reinsurance proposal; the retirement of the company from the insurance business; the proposed liquidation of Woodmen Central; and the reasons for such proposals. The letter set forth in detail the basis of the purchase price and the manner in which it was computed, together with an estimate of the proposed total dollar consideration for the insurance in force, as of December 31, 1954, and the value of the furniture, fixtures, equipment, and supplies, together with the estimated amount of liquidating dividends of about $50 per share which would be realized and paid to the stockholders. In that connection, a total of $55 per share had been declared and largely

paid out to the stockholders of Woodmen Central as the first two liquidating dividends when plaintiffs' action was filed. The president's letter specifically pointed out that Woodmen Central's investment in agency force "* * * is not believed to be a recoverable item which could be reflected in the consideration proposed in the Reinsurance Agreement," which shows that it was not so reflected.

Out of a total of 19,491 shares of outstanding stock of Woodmen Central, 17,784 shares, or 91.24 percent of the total stock, were represented in person or by proxy at the meeting on December 20, 1954, to vote on the reinsurance proposal made by Woodmen Accident. Ballots were distributed, and following voting by ballot the secretary reported that ballots representing 17,784 shares had been voted in favor of the preamble and resolution for approval and adoption of the reinsurance agreement, and that no ballots had been voted against it. In that connection, plaintiffs complained that language of the proxy forms mailed to the stockholders was only affirmative in character, but no authority is cited in condemnation thereof, and under the circumstances presented here, we consider that fact to be of no consequence in arriving at a decision of the issues presented.

On February 23, 1955, at the first annual meeting of stockholders of Woodmen Central after the special meeting of December 20, 1954, some 16,061 shares of stock were represented in person or by proxy out of a total of 19,491 outstanding shares. The minutes of the December 20, 1954, meeting were there read, ratified, confirmed, and approved unanimously after the president had presented and read a detailed report on corporate actions taken during the preceding year; details of consummation of the reinsurance agreement; the proposed withdrawal of Woodmen Central from states in which it had been operating; and a proposal to dissolve and distribute assets of the company, which report was thereupon approved and adopted unanimously

by vote of all stockholders represented, and same was ordered filed with the minutes of the meeting. Rucklos, after a discussion of the effect of the reinsurance agreement and the future of the company, moved that the company be dissolved and that a special meeting of the board of directors be held to further that action on the same date. His motion was adopted unanimously by the stockholders, and the directors were reelected by unanimous vote of the stockholders. Plaintiff Peters was present at that meeting, but testified that he stood pat and did not vote. At said special meeting of the directors held on that same date they adopted a resolution declaring it advisable for the company to be dissolved and calling a special meeting of stockholders for March 28, 1955, to take action on the proposal to dissolve. At such special meeting on March 28, 1955, there were 17,581 shares of stock represented in person and by proxy out of 19,491 shares outstanding, and the resolutions for dissolution of the company and for a partial distribution of $25 per share as first liquidating dividends payable to stockholders July 1, 1955, were carried unanimously. In addition to the usual notice of that meeting by the secretary, a letter from the president was enclosed, detailing the action that was to be considered at the meeting relating to dissolution and liquidation and the amount of liquidating dividends contemplated. A copy of that letter was attached to the minutes of the meeting. Plaintiff Peters was not present at that meeting.

At the annual meeting held on February 21, 1956, there were 17,260 shares of stock represented in person or by proxy. Thereat the minutes of the last annual meeting of the stockholders held on February 23, 1955, and the minutes of the special meeting of stockholders held on March 28, 1955, were read, presented, ratified, confirmed, and approved by unanimous vote of all stockholders present or represented, and directors were reelected by unanimous vote of said stockholders. Plain-

tiff Peters was also admittedly present at that meeting, but testified that he stood pat and didn't vote. There the president again made a detailed report of actions taken during the preceding year with reference to the dissolution of the company, distribution of the first liquidating dividend of $30 a share on June 18, 1955, distribution of a second dividend of $25 a share on February 15, 1956, and a proposed deferment of the final dividend distribution until final clearance could be obtained concerning income tax obligations. He also reported upon examination of the company, and the reinsurance agreement by the Department of Insurance, and such report was attached to the minutes of the meeting.

On September 22, 1955, following the annual meeting on February 23, 1955, and the special meeting on March 28, 1955, but prior to the annual meeting of February 21, 1956, plaintiff Peters wrote the Woodmen Accident requesting additional information regarding the reinsurance transaction. The president replied on September 27, 1955, summarizing the transaction, advising him that he would ultimately receive about $60 a share for each of his 10 shares of stock upon completion of liquidation, and offering to discuss the matter further with him and answer any question at any mutually convenient time. In the meantime, plaintiff Peters never has surrendered his stock or accepted payment of his dividends. In that connection, defendants alleged that by reason of the foregoing alleged affirmative action taken by Peters, he was estopped to maintain this action; that plaintiffs' ownership of stock constituted a trifling interest which will not sustain the action; and that by failure to make timely demand, laches had barred plaintiffs' action. There are authorities from this and other jurisdictions which give defendants some reason to make such claims, but we prefer to put final decision on other grounds. In that connection, we conclude that the evidence is overwhelmingly clear and convincing that the

reinsurance agreement was fair, just, and adequate in every material respect; that there was no fraud, deception, concealment, or misrepresentation of fact or overreaching, plan, scheme, or conspiracy to cheat or defraud the stockholders of Woodmen Central or said company, or practiced in connection with consummation of the reinsurance agreement; and that prior to its consummation plaintiffs and all other stockholders of Woodmen Central and the Department of Insurance as well were given full, true, complete, and adequate information and notice concerning every material step involved in the proposed reinsurance agreement, including notice and information that no separate and additional amount was included in the consideration proposed in the reinsurance agreement for agency force of Woodmen Central because it never had any separate agency force deliverable by it as such to Woodmen Accident or to any other purchaser of its insurance or assets.

In that connection, plaintiffs argued that actuaries Reitz, Haffner, and Gribble, as witnesses called by defendants, had changed their stories concerning valuation of the agency plant and that such testimony should be discredited as a matter of law and disregarded. We do not agree. The record discloses that their previous approval of report or memorandum containing or proposing inclusion of a separate agency valuation was predicated upon an erroneous assumption and without having full information regarding the related agency facts. As witnesses at the trial, they simply explained that situation and testified that upon having learned of the facts with relation to the agency force, they had changed their opinions and agreed that a separate agency valuation should have been excluded from the consideration proposed in the reinsurance agreement. This is not a case wherein a party without reasonable explanation testified to facts materially different concerning a vital issue than had previously been testified to by him under oath in another action, the change

clearly being made to meet the exigencies of the pending action which may require that the evidence be discredited as a matter of law and disregarded. Authorities relied upon by plaintiffs are entirely distinguishable. The law applicable here appears in 98 C. J. S., Witnesses, § 621, p. 636, whereat, citing authorities, it is said: "Where evidence of a witness' prior evaluation of certain property, inconsistent with its present estimate, is introduced, the witness may explain the circumstances of his former evaluation and state why he now testifies differently."

At most, the report or memorandum previously approved by Reitz, Haffner, and Gribble were only extrajudicial statements which were not conclusive but might be explained, rebutted, or contradicted, and thereafter given such weight as the trier of facts deemed them entitled. See Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751.

For reasons heretofore stated, we conclude that the judgment of the trial court should be and hereby is affirmed. All costs are taxed to plaintiffs.

AFFIRMED.

HARRY C. DAVIS, APPELLANT, V. JAMES KEITH WALKER ET AL., APPELLEES.
104 N. W. 2d 479

Filed July 29, 1960. No. 34704.

1. **Constitutional Law.** Sections 81-347 and 81-348, R. R. S. 1943, are not unconstitutional as in violation of Article I, section 25, Constitution of Nebraska.
2. **Licenses.** Prior to enactment of sections 81-347 and 81-348, R. R. S. 1943, which became effective September 18, 1955, there was no specific remedy for recovery of money paid out for the purchase of securities and interests issued, sold, exchanged, or transferred in violation of the Blue-Sky Law, and no recovery can be had under said sections for the value of consideration paid for securities and interests purchased prior to the date said statutes became effective.

3. **Licenses: Statutes.** Sections 81-347 and 81-348, R. R. S. 1943, created a specific remedy which did not exist at common law. As a general rule statutes will not be understood as effecting any change in the common law beyond what is clearly indicated, and statutes in conflict with the common law must be strictly interpreted.
4. **Corporations: Licenses.** Sections 81-347 and 81-348, R. R. S. 1943, do not expressly purport by their language to make officers and directors of a corporation liable simply because they are officers and directors, but said statutes did not change their preexisting corporate responsibilities and duties in handling the affairs and transacting the business of the corporation.
5. **Corporations.** As a general rule, directors of a corporation may not delegate their corporate responsibilities and duties as directors to others and avoid liability therefor, and since a corporation has no thought or will of its own, its every act is the act of those who are running it.
6. ———. An officer or director of a corporation occupies a fiduciary relation to the corporation and its stockholders. He is treated by courts of equity as a trustee, and every violation by a trustee of a duty required of him by law, whether willful and fraudulent or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust.
7. ———. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of an officer or director of a corporation creates the same liability as actual knowledge and a failure to act thereon, and where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacity.
8. **Corporations: Licenses.** Generally, an officer or director of a corporation who participates directly or indirectly for the use and benefit of himself or the corporation in the issue, sale, exchange, or transfer of securities or interests by the corporation without having first obtained from the Department of Banking a permit to do business as a broker or salesman, as required by provisions of the Blue-Sky Law, is personally liable under the provisions of sections 81-347 and 81-348, R. R. S. 1943.

APPEAL from the district court for Lancaster County: HARRY R. ANKENY, JUDGE. *Affirmed in part, and in part reversed and remanded with directions.*

Max Kier, for appellant.

Barney, Carter & Buchholz, Nate C. Holman, and *Muffly & Snyder*, for appellees.

Heard before MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CHAPPELL, J.

Plaintiff, Harry C. Davis, brought this action against defendants, James Keith Walker, Dennis H. Sexson, Rock H. Castellano, Michael E. Layon, W & M Oil Company, a Nebraska corporation, and Wyoming Oil Company, a Delaware corporation, seeking recovery under the provisions of sections 81-347 and 81-348, R. R. S. 1943, which became effective September 18, 1955, and are a part of an act known as the Blue-Sky Law.

Plaintiff's amended petition alleged in substance that defendants, except Wyoming Oil Company which merged with W & M Oil Company on June 21, 1956, and thereby assumed all debts, liabilities, and duties of whatsoever kind or nature of W & M Oil Company, did sell, issue, exchange, and transfer to plaintiff in Nebraska certain Wyoming stocks, securities, and interests in five separate transactions, designated as 3-a to 3-e inclusive, in violation of sections 81-302 to 81-346, R. R. S. 1943, because defendants never did possess licenses and permits from the Department of Banking of this state authorizing them to do business as brokers or salesmen. Plaintiff also alleged that he never received any income or recovery from any such stocks, securities, and interests; that the total consideration paid by plaintiff to defendants therefor was $9,450; and that he complied with section 81-348, R. R. S. 1943, by depositing with the clerk of the district court for the use and benefit of defendants all such stocks, securities, and interests received by plaintiff from defendants. Plaintiff's prayer was for a finding that the aforesaid allegations were true; that defendants were liable to plaintiff for $9,450 with interest from the respective dates of the transactions; or for such sum as equity shall determine to be due.

Defendants Walker, W & M Oil Company, and Wy-

oming Oil Company answered, denying generally but admitting merger of the two oil companies prior to the institution of this action as alleged, and alleging that plaintiff purchased a 2 percent working interest in an 80-acre drill site lease known as State of Wyoming B lease, but alleged that such transaction was negotiated at plaintiff's special instance and request without solicitation by defendants. The last allegation is not supported by the evidence and is entirely immaterial in any event. Their prayer was for judgment in their favor and recovery of costs.

Defendant Castellano answered, denying generally and alleging that he never sold, issued, exchanged, or transferred to plaintiff any securities or interest therein in violation of the statutes as alleged; that he never expressly or impliedly authorized or appointed any person to act as broker or salesman or to negotiate for the issue, sale, exchange, or transfer of any securities within the State of Nebraska; that he had no notice or knowledge of the publication of any advertisement by defendant corporations; that he had not been a director of either corporation for more than 2 years before commencement of plaintiff's action, which was barred by the statute of limitations; and that the statutes relied upon by plaintiff were unconstitutional in certain respects which were not presented or argued in said defendant's brief. His prayer was for dismissal, recovery of costs, and equitable relief.

Defendant Layon answered, admitting the merger of defendant corporations as alleged, but denying generally and alleging in substance the same allegations as appear in Castellano's answer. Layon also alleged that plaintiff had not complied with the provisions of section 81-348, R. R. S. 1943, because he failed and refused to deposit with the clerk of the district court the securities described in transactions 3-a, 3-b, and 3-c of plaintiff's petition. He further alleged that plaintiff, with the intent of securing financial gain, induced and assisted in

inducing persons to purchase securities not exempt under section 81-312, R. R. S. 1943, and did receive therefor financial gain without being first licensed as broker or salesman, as required by statute, therefore plaintiff was not entitled to seek relief in equity. In connection with the last allegation, we find no competent evidence in this record to sustain such contention. Defendant Layon's prayer was for dismissal, recovery of costs, and equitable relief.

Plaintiff's replies to each of the foregoing answers were general denials of allegations appearing in defendants' answers, except such as admitted the allegations of plaintiff's petition. Requests for admissions were served upon defendants and filed, together with answers thereto, and the cause was tried to the court whereat evidence was adduced and a judgment was rendered. The judgment found that service was had on all defendants except Dennis H. Sexson who is thus not primarily involved here; that between August 18, 1955, and March 21, 1956, plaintiff purchased certain securities from defendant, W & M Oil Company, now merged with Wyoming Oil Company, except only a promissory note dated March 21, 1956, for $1,500, representing a loan from plaintiff to W & M Oil Company, which was in default and for which Wyoming Oil Company was liable to plaintiff. The judgment found, however, that plaintiff's right to recover consideration paid by him for the securities was based upon equitable rescission and that the authority prescribed in section 81-348, R. R. S. 1943, required restitution of the exact securities purchased. It then found that plaintiff had failed to make restitution of the securities described in his petition or deposit same with the clerk of the district court for the use and benefit of defendants. For such reason the court found the issues generally against plaintiff and in favor of defendants and each of them with respect to recovery of the consideration paid for such securities, except that plaintiff should have judg-

ment against Wyoming Oil Company, successor to W & M Oil Company, upon the promissory note aforesaid, for $1,500 with interest at 5 percent from March 21, 1956, and costs of the action. Judgment was rendered accordingly, and plaintiff's petition was dismissed as to defendants Walker, Castellano, and Layon, with recovery of costs by each such defendant from Wyoming Oil Company.

Plaintiff's motions for new trial were overruled, and he appealed, assigning in substance and effect that the findings and judgment of the trial court were erroneous and contrary to the evidence and law, "except only as to the award of judgment on the promissory note." We sustain the assignment to the extent and in the manner hereinafter set forth, after trial de novo under rules too well established to repeat.

Section 81-347, R. R. S. 1943, provides: "Any person, except a person who shall have obtained from the Department of Banking a permit to do business as a broker or salesman, who shall within the State of Nebraska sell, issue, exchange, or transfer any security or interest therein in violation of sections 81-302 to 81-346, shall be liable to the purchaser of the security for the value of the consideration paid by the purchaser less the amount of any income or recovery received thereon." In that connection, it is proper to point out here that the record is conclusive that plaintiff did not ever receive "any income or recovery" from the securities involved.

The terms "security" or "securities" are defined by section 81-304, R. R. S. 1943, and the shares of stock and undivided interests here involved are admittedly included in such definitions. The same section separately provides that: "The term 'person' or 'persons' shall include every corporation, partnership, joint stock company, declaration of trust association and every other character of association, and every individual, whether such corporation, partnership, joint stock company or

association is foreign or domestic, and irrespective of whether such individual is a resident or nonresident of this state." The section also provides that the term "issuer" means and includes "* * * every person, both real and corporate who, as maker or issuer, or in the name or names of whom, or upon the responsibility or liability of whom, securities are proposed for issue, are issued, have been issued, or hereafter are issued."

Section 81-348, R. R. S. 1943, provides: "An action to enforce liability as provided in section 81-347 must be commenced within three years after the date of the sale, issuance, exchange, or transfer of the security and may be brought in any county in which the cause of action or some part thereof arose, or in any county where the defendants, or some one of the defendants, resides or may be summoned. Such an action shall be heard and determined by the court as an action in equity. At the time such an action is commenced, the plaintiff shall deposit with the clerk of the district court for the use and benefit of the defendant the security involved in the action." In connection with the last sentence, we conclude that plaintiff complied therewith in every respect, and that the trial court erroneously held otherwise. The evidence is conclusive that plaintiff so deposited every exact material instrument representing the securities involved which had been received by him. Any evidence adduced by defendants with relation thereto was equivocal and is incredible when viewed in the light of positive evidence and undisputed facts appearing in this record. Also, contrary to defendants' contentions, plaintiff was not required to deposit his own assignments of the securities back to defendants or to offer to make good any loss defendants may have suffered as a result of their unlawful transactions. This is also a proper place to point out that section 81-331, R. R. S. 1943, which provides for a 2-year statute of limitations, deals with distinguishable matters, and that the limitation of 3 years provided in

section 81-348, R. R. S. 1943, and applicable here, has not barred plaintiff's action. We also point out here that the constitutional validity of the Blue-Sky Law and provisions therein, comparable with those at bar, have generally been upheld by state and federal courts in cases too numerous to cite. It is sufficient to simply cite Annotation, 87 A. L. R., pages 45 to 60, and authorities cited and discussed therein. We hold that sections 81-347 and 81-348, R. R. S. 1943, are not unconstitutional as in violation of Article I, section 25, Constitution of Nebraska, as presented and argued by defendant Layon. Authorities cited and relied upon by him are entirely distinguishable.

At the outset we start with the admitted fact that neither W & M Oil Company nor its successor Wyoming Oil Company, which by merger assumed all debts, liabilities, and duties of W & M Oil Company, ever had any license or permit from the Department of Banking of this state to issue, sell, exchange, or transfer in this state any shares of stock or working interests in oil or gas drill sites in Wyoming or ever had any licenses or permits to operate as brokers or salesmen. Also, no individual defendant ever had any license or permit from the Department of Banking authorizing him to issue, sell, exchange, or transfer in this state any such stock or securities. As a matter of fact, such licenses and permits were admittedly withdrawn or entirely denied. In that connection, defendant Walker was president and director of both such corporations at all times here involved. Defendant Layon was a director and officer of W & M Oil Company from October 3, 1955, to April 15, 1956. Defendant Castellano was a director and officer thereof from April 30, 1955, until November 30, 1955. Also, they were all shareholders in W & M Oil Company, and were paid salaries by said corporation as officers thereof.

The first transaction, designated as 3-a, upon which plaintiff sought recovery of $950, occurred on August

18, 1955, when he executed a contract agreement to purchase and purchased in Nebraska from W & M Oil Company a 1 percent working interest in a described drill site oil lease known as "Lucian Robinson #1" located in Wyoming. Plaintiff paid therefor $750 by check dated August 18, 1955, and payable to W & M Oil Company, which payment was receipted for on the same date by letter, signed "W & M Oil Co., J. K. Walker President," wherein it was recited that it covered "the purchase of a 1% interest in the Lucian Robinson #1, located in Crook County, Wyoming."

It appears that an operating agreement was not delivered to plaintiff until September 26, 1955, and thereafter plaintiff paid $200 on November 25, 1955, covering his share of the estimated cost of completion of drilling a well on the Lucian Robinson No. 1 lease. Also, on that date plaintiff was sent a letter acknowledging receipt from him of his check for said $200 "covering the estimated cost of completion," which letter was signed "W & M Oil Company, Michael E. Layon, Vice President." However, the purchase and sale transaction was complete on August 18, 1955, prior to September 18, 1955, the effective date of sections 81-347 and 81-348, R. R. S. 1943. In that connection, this court held in Savorelli v. Stone, 168 Neb. 419, 96 N. W. 2d 222, that: "Prior to the enactment in 1955 of sections 81-347 and 81-348, R. R. S. 1943, there was no specific remedy for recovery of money paid out for the purchase of securities sold in violation of the Blue-Sky Law." Since plaintiff relies exclusively thereon, we conclude that he cannot recover on his first alleged transaction, designated as 3-a, because the purchase was actually made and completed prior to the date said sections became effective.

The second transaction, designated as 3-b, upon which plaintiff sought to recover $1,500 and interest, occurred on September 28, 1955, when he executed a contract agreement to purchase and purchased in Nebraska from W & M Oil Company a 2 percent working interest in a

described 160-acre drill site oil lease known as Moore No. 1, subject to a 12½ percent override, in Crook County, Wyoming. For such interest plaintiff paid $1,500 on September 30, 1955, which was receipted for by "W & M Oil Company, J. K. Walker, President," on October 3, 1955.

The third transaction, designated as 3-c, upon which plaintiff sought recovery of $1,500 and interest, also occurred on September 28, 1955, when plaintiff executed a contract agreement to purchase and purchased in Nebraska a 2 percent working interest in a described 80-acre drill site oil lease known as Wyoming B, subject to a 12½ percent override, in Crook County, Wyoming. For such purchase plaintiff paid $1,500 on September 30, 1955, which was receipted for by "W & M Oil Company, J. K. Walker, President," on October 3, 1955. In that connection, transactions 3-b and 3-c are related in that they both occurred on September 28, 1955, and two adjustments were subsequently made by reducing the override from 12½ percent to 4 percent in both transactions 3-b and 3-c, and by giving plaintiff a 2 percent interest in a 160-acre lease site, instead of an 80-acre lease site, in the third transaction, 3-c, "as a compensation for your (plaintiff's) patience" as said, when on January 19, 1956, W & M Oil Company, J. K. Walker, president, mailed to plaintiff assignments of his interest theretofore purchased as adjusted, together with an explanation thereof. In that connection, we call attention to the fact that defendant Layon was not a director or officer when the foregoing purchases were originally made and completed, and he is not liable as such upon transactions 3-b and 3-c.

The fourth transaction, designated as 3-d, upon which plaintiff sought recovery of $4,000 and interest, involved the admitted purchase by him in Nebraska of 1,000 shares of W & M Oil Company stock on or about December 14, 1955. In that connection, on December 15, 1955, plaintiff gave W & M Oil Company his note for $4,000,

upon the back of which was endorsed "Rec'd. Payment $400 DHS Balance — $3600.00 W & M Oil Co. by J. K. Walker." Such $400 was paid by plaintiff's check dated December 14, 1955, payable to W & M Oil Company, which check bore the notation "Payment on Stock." On January 19, 1956, plaintiff paid W & M Oil Company $1,600 by check payable to it. On January 31, 1956, W & M Oil Company billed plaintiff for a $2,000 balance due for his purchase of said stock, and on March 2, 1956, plaintiff paid same by check payable to W & M Oil Company and received a receipt for "Total Balance Due." On February 8, 1956, W & M Oil Company, by J. K. Walker, president, wrote plaintiff at his home in Beatrice advising him of a five to one stock split by W & M Oil Company whereby for his 1,000 shares plaintiff became the owner of 5,000 shares. The letter said in part, "We are looking forward to greater expansion and growth of our Company." On August 16, 1956, following a merger of the two corporations, J. K. Walker, president of Wyoming Oil Company, issued and delivered to plaintiff 7,500 shares of its stock in lieu of plaintiff's W & M Company stock, thereby giving plaintiff five free 500-share stock certificates. We also point out that Castellano never was a director or officer of Wyoming Oil Company and was not a director or officer of W & M Oil Company when transaction 3-d originated and was completed, and he is not liable as such upon transaction 3-d.

In that connection, this record discloses that on September 19, 1957, an information was filed by the State of Nebraska in the district court for Gage County, charging in count IV thereof: "That James Keith Walker did on or about December 14, 1955, in Gage County, Nebraska willfully and unlawfully sell certain securities consisting of 1,000 shares of capital stock of the W & M Oil Company, a corporation, without having secured from the Department of Banking of the State of Nebraska a permit to do business as a broker or salesman."

The charge admittedly related to the sale of the same stock as that sold to plaintiff in transaction 3-d. Thereafter, on September 25, 1957, said defendant appeared in open court with counsel, was duly arraigned, entered a plea of guilty to count IV, was found guilty as charged, was put on probation for 3 years, and was duly sentenced by the court to pay a fine of $1,000 and costs. Further, on February 16, 1957, a petition was filed in the district court for Lancaster County, entitled "State of Nebraska, ex rel. the Department of Banking of the State of Nebraska, J. F. McLain, Director, Relator vs. James Keith Walker, Harold E. Kistner, and Wyoming Oil Company, Respondents," seeking to enjoin respondents who had not been licensed as brokers or salesmen from further violating the Blue-Sky Law of Nebraska by issuing, selling, and exchanging or offering to sell or exchange in Nebraska securities consisting of shares of the capital stock of Wyoming Oil Company, and other securities including undivided fractional working interests in oil and gas leases located on land in Wyoming. Thereafter, on April 11, 1957, after a hearing whereat evidence was adduced by the parties, a permanent injunction was rendered, granting the relief sought by relator.

The fifth transaction, designated as 3-e, upon which plaintiff sought recovery of $1,500 and interest, involved a loan to W & M Oil Company evidenced by a promissory note dated March 21, 1956, for $1,500, payable to plaintiff at Beatrice, Nebraska, 1 year after date with interest at 5 percent, and signed W & M Oil Company by J. K. Walker, president, D. H. Sexson, secretary. The loan was made by plaintiff because Walker informed him that the company needed money. The $1,500 loan was paid to W & M Oil Company by plaintiff's check payable to it and dated March 21, 1956. In that connection, on March 21, 1956, W & M Oil Company, J. K. Walker, president, wrote plaintiff a letter enclosing the company's note for $1,500, and informing him that he had the privilege in connection therewith of having his

choice to select and purchase "up to 3% interest in any lease that we drill in which we are selling interests * * * after the test has been drilled" and "within sixty (60) days after the well has been put on production," which purchase would then be applied "against the principal of this note." Plaintiff never accepted such offer or made any such selection or choice, and there is no evidence that any well was ever thereafter put on production. The trial court awarded plaintiff a judgment against Wyoming Oil Company for recovery upon that transaction, and no appeal was taken therefrom.

There can be no doubt that defendants Wyoming Oil Company and James Keith Walker are liable to plaintiff upon transactions 3-b, 3-c, and 3-d. The primary question here is whether or not Castellano is liable as officer and director upon transactions 3-b and 3-c, and whether or not defendant Layon is liable as officer and director upon transaction 3-d, bearing in mind that admittedly Castellano was a director of W & M Oil Company from April 30, 1955, until November 30, 1955, and Layon was a director from October 3, 1955, until April 15, 1956. Also, both such defendants were shareholders in and vice-presidents of W & M Oil Company and they drew salaries as such therefrom until they no longer served as directors.

As early as June 11, 1955, counsel for W & M Oil Company wrote a letter, saying: "With reference to our discussion of the other day, you must be certain that the corporation does not sell shares of its stock pending the qualification of the issue which has been submitted to the S.E.C. * * * A number of questions have been asked that must be answered to the satisfaction of the Commission and I would hope it could be cleared for offer sometime soon. It is my understanding that all offerings so far submitted for the sale of undivided (fractional) working interests in the various leases have been accepted by the S.E.C. I hope that we may obtain a similar clearing from the Department

of Banking in Nebraska. Even though the company may not agree with some of the technical requirements of 'government' they must be met." Counsel then wrote on the face of that letter in his own hand that it should be placed "with minute book or other records."

The minutes disclose that on October 3, 1955, at 10 a. m., a special meeting of stockholders in W & M Oil Company was held with 90,000 out of 100,000 shares outstanding represented, whereat Walker, Sexson, Castellano, and Layon were present and were elected directors. There president Walker reviewed the activities of the company since the last meeting of stockholders, and called upon Castellano to report on prospects of the new field which seemed to have been opened up, and Castellano advised that he was preparing a detailed report of the Wyoming land to be mailed to each shareholder and interest-holder. The articles of incorporation and by-laws were then voted to be changed in particulars unimportant here.

Also, the minutes disclose that on October 3, 1955, at 2 p. m., a special meeting of the board of directors was held with Walker, Sexson, Castellano, Layon, and counsel present. There president Walker presided and discussed recent acquisitions of leases in Wyoming, Colorado, and Oklahoma, and asked for approval of arrangements to purchase leases from one Ed Moore on described land in Crook County, Wyoming, and the taking over of a government lease in Florida. Discussion was then had concerning the fact that most acquisitions of the past had been had in the name of the company, but that by side arrangement several employees who participated in the promotions had interests in them, and upon advice of counsel it was unanimously determined that all future deals should be entered into in the name of and for the sole benefit of the corporation. The amendments of the articles and by-laws approved by the shareholders on October 3, 1955, at 10 a. m., were read, approved, and adopted. Thereupon Walker was

elected president with a salary fixed at $800 a month; Castellano was elected vice-president, geological, with a salary fixed at $400 a month; Layon was elected vice-president, land, sales and development, with a salary fixed at $400 a month; and Sexson was elected secretary-treasurer, with a salary fixed at $400 a month. Also, counsel for the company was retained at a salary of $350 a month, and after considerable discussion, sales commissions were fixed at 20 percent as fair and proper. The then situation with the Department of Banking was discussed, and it was determined that every effort should be carried on to obtain the necessary licenses and permits, and counsel then stated that no sales should be made until they were obtained.

The minutes disclose that at a special meeting of the board of directors on December 6, 1955, Walker, Sexson, Layon, Castellano, and counsel were present, and the minutes of the preceding meeting were read and approved. There counsel outlined charges which the state had brought against one of the company's representatives, and pointed out the seriousness thereof. He stated that further meetings were scheduled with the Department of Banking with respect to its refusal to approve the offerings, and warned that no sale thereof should be attempted under any circumstances until approved. In answer to a question about offerings in Missouri, counsel advised that with limited exceptions, so long as S.E.C. clearance had been obtained, they might so proceed in Missouri, but not to exceed the limitation. There also Castellano's resignation previously submitted was accepted, effective November 30, 1955.

The minutes disclose that a special meeting of the board of directors was held on January 6, 1956, with Walker, Sexson, Layon, and counsel present, together with Castellano, who was no longer a director but serving as geologist. There the minutes of the last meeting were read and approved and discussion was had of the problems facing the company because of failure to

receive sufficient sums of money from time to time. It was determined that president Walker should send out a bulletin describing the stock split of W & M Oil Company and renew his request of the need for payment of drilling completion costs. Counsel there advised that the Department of Banking had denied all requests for approval and licenses; stated that no one employed by the company was authorized to sell securities or working interests in Nebraska; cautioned that severe penalties could be imposed for violation of that requirement; and stated that any future offerings would have to be submitted to the state before sales could be made. There, among other things, it was resolved that Layon, as vice-president, should have the same authority to sign, execute, and acknowledge any and all instruments as the president of the corporation was theretofore authorized to execute, including execution of certificates of capital stock of the corporation, except that in executing and signing checks or drafts drawn against the bank account of the company, they should require the names of Walker and Layon in addition to the name of the corporation. There also Layon offered to transfer to the company Wyoming holdings owned by him having an estimated value of $48,000 for the one-half interest owned by the company in Copan Oil Field leases in Oklahoma, and president Walker stated that such offer would be submitted to the owners of the other half interest for their consideration.

Thereafter, on January 9, 1956, counsel wrote another letter to Walker, president, and W & M Oil Company, pointing out again that as advised by the Director of the Department of Banking of Nebraska, the statutes prohibited the solicitation or exchange of securities unless the salesman is licensed to do so, which was conclusive as far as stock sales are concerned; that for such reason they should reconsider their method of operation; and that they could not sell any of the Wyoming deals to Nebraska persons unless and until new ones

were submitted for approval in this state. He also said: "Since you have indicated that one or two sales were made in Nebraska * * * I suggest that the persons to whom those sales were made would, under the law, be entitled to return their interests and receive back the money paid for them. And, make certain that no future sales are made to Nebraska people of any Wyoming interest or stock in the company."

The minutes disclose that at a meeting of the board of directors on March 10, 1956, Walker, Layon, Sexson, and counsel were present. There the minutes of the last meeting were read and approved and the exchange of a one-half interest in the Copan lease to Layon, as proposed by him on January 6, 1956, was ratified and approved, and counsel advised Layon that it would be improper for him to compete with the company in development of his personal properties, especially while he was receiving a salary from the company, which Layon promised he would not do. Counsel advised also that something must be done about litigation pending against the company and liquidation of a judgment already obtained by one named person in North Platte.

The minutes disclose that at a meeting of the board of directors on March 24, 1956, Walker, Layon, Sexson, and counsel were present, and the minutes of the meeting of March 10, 1956, were read and approved. There Layon tendered his 1½ percent working interest in Moore Well No. 1, and drill block located in Crook County, Wyoming, in full settlement of an advance of $1,500, which had been made to him by W & M Oil Company on October 5, 1955, just 2 days after he first became a director. His proposal was accepted and placed in the minute book. A prepared financial statement of W & M Oil Company from September 1, 1955, through March 15, 1956, was received in evidence. It shows a total gain of $146.37 after payment of listed salaries and expenses, and listed income from oil operations, rental

income, discount taken, sundry income, loans, and sales of 3,630 shares of stock.

The minutes disclose that at a meeting of the board of directors on April 17, 1956, Walker, Sexson, Layon, and counsel were present. Castellano was also present but admittedly he was not then a director. There Layon's previously-submitted resignation, effective April 15, 1956, was accepted, and a resolution was adopted directing the president and secretary to meet with Layon and effect a fair settlement of the division of property interests held by him, and that they should also meet with Castellano and make a similar settlement and division with him.

The minutes disclose that at a meeting of the board of directors on May 21, 1956, Walker and Sexson were present, together with Layon who was not then a director. There president Walker offered a proposed agreement for the merger of W & M Oil Company and Wyoming Oil Company. Same was approved, together with a resolution calling a special meeting of the stockholders for June 21, 1956, to approve or disapprove the merger. Such was thereafter so approved, and a copy of the merger agreement and appointment of Walker as resident agent for Wyoming Oil Company were filed in the Secretary of State's office.

Contrary to contention of the defendants, there is no competent evidence in this record that the stocks and securities involved here were exempt from operation of the Blue-Sky Law.

Sections 81-347 and 81-348, R. R. S. 1943, created a specific remedy which did not exist at common law. See Savorelli v. Stone, *supra*. It is the general rule that statutes will not be understood as effecting any change in the common law beyond what is clearly indicated, and statutes in conflict with the common law must be strictly interpreted. See, Strauel v. Peterson, 155 Neb. 448, 52 N. W. 2d 307; Platte Valley P. P. & I. Dist. v. County of Lincoln, 163 Neb. 196, 79 N. W. 2d 61.

The two sections of the statute aforesaid do not expressly purport by their language to make officers and directors of a corporation personally liable simply because they are officers and directors thereof. Be that as it may, such statutes did not change the preexisting responsibilities and duties of officers and directors of a corporation in handling its affairs and transacting its business. In that connection, as long ago as Ashby v. Peters, 128 Neb. 338, 258 N. W. 639, 99 A. L. R. 843, this court concluded that directors of a corporation may not ordinarily delegate their corporate responsibilities as directors to others and avoid liability therefor; that directors are held to that degree of care which men of common prudence take of their own concerns; that a corporation has no thought or will of its own, and its every act is the act of those individuals who are running it; that where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon; and that where fraud is committed by a corporation, which is the situation in the case at bar, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities. See, also, Ashby v. Peters, 124 Neb. 131, 245 N. W. 408. We have also concluded that an officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders, and is treated by courts of equity as a trustee; and that every violation by a trustee of a duty required of him by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. Whaley v. Matthews, 134 Neb. 875, 280 N. W. 159; Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393.

In 47 Am. Jur., Securities Acts, § 46, p. 598, citing many authorities, it is said: "The general principle that a director or officer of a corporation does not incur personal liability for its torts merely by reason of his offi-

cial character and is not liable for torts committed by or for the corporation unless he has participated in the wrong has been incorporated by express terms in some of the statutes providing for personal liability of directors and officers of a corporation which issues or sells securities in violation of statutory requirements. Most statutes of this type condition the personal liability of a corporate director or officer upon his personally participating, or aiding in any way, in making the illegal sale. The same principle is applied where personal liability of a corporate director or officer for an illegal sale of securities is predicated upon statutes which contain no express provisions as to the personal liability of such director or officer." See, also, 53 C. J. S., Licenses, § 77, p. 785, citing authorities.

In the case at bar, defendants Walker, Layon, and Castellano, while acting as officers and directors, not only should have known but they actually did know beyond preadventure of a doubt that W & M Oil Company never had any license or permit to operate as a broker or salesman or to issue, sell, exchange, or transfer in Nebraska any security or interest in Wyoming, as here involved, and that no officer or salesman of said company had any license or permit to do so. It is true also, from evidence heretofore set forth, that said defendants, while officers and directors, not only had the duty to be responsible for the transactions involved but also they participated both directly and indirectly in the illegal transactions for the use and benefit of the W & M Oil Company and themselves as shareholders and officers, and they received payment of their salaries as such officers at least in part from the proceeds of such transactions. In that connection, Wyoming Oil Company, by its merger with W & M Oil Company, as "constituent companies" assumed all of the debts, liabilities, and duties of W & M Oil Company.

For reasons heretofore stated, we conclude that plaintiff cannot recover upon the first transaction, desig-

nated as 3-a, and that the judgment of the trial court against defendant, Wyoming Oil Company upon the fifth transaction, designated as 3-e, should be affirmed. On the other hand, we conclude that plaintiff is entitled to recover as against defendants Walker, Castellano, and Wyoming Oil Company as prayed upon the second and third transactions, designated as 3-b and 3-c, and that plaintiff is entitled to recover as against defendants Walker, Layon, and Wyoming Oil Company as prayed upon the fourth transaction, designated as 3-d.

In such respects as aforesaid, the judgment of the trial court should be and hereby is affirmed in part and reversed in part, and the cause is remanded with directions to render judgment for plaintiff in conformity with this opinion. All costs in this court are taxed to defendants, James Keith Walker and Wyoming Oil Company.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

ANTONIN SEMRAD ET AL., APPELLEES, V. FRANTISEK SEMRAD ET AL., APPELLEES, STATE OF NEBRASKA, INTERVENER-APPELLANT.
104 N. W. 2d 338

Filed July 29, 1960. No. 34786.

1. **Escheat.** An escheat upon a failure of heirs, under section 76-401, R. R. S. 1943, vests the title to the escheated lands in the state on the death of the owner. Action by the state for a judicial determination that such an escheat has vested is not required.
2. ———. The words "failure of heirs," contained in such statute, mean an absence of heirs competent to take by descent or devise.
3. **Courts: Descent and Distribution.** The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of a decedent, and to make incidental orders with reference thereto necessary to administer the estate.

In so doing the court has no jurisdiction to determine the title to real estate, nor adverse claims involving the title to real estate.

4. **Officers.** The Attorney General of this state has no authority to waive the rights of the state in its property or to bind the state by consenting to its alienation.
5. **Partition: Parties.** A decree for the partition of real estate in which the owner thereof is not made a party is absolutely void and it may properly be set aside at or after the term at which it was entered.

APPEAL from the district court for Saline County: STANLEY BARTOS, JUDGE. *Reversed and remanded.*

Clarence S. Beck, Attorney General, and *Richard H. Williams*, for intervener-appellant.

John E. Mekota, Dredla & Dredla, and *Clarence C. Kunc*, for appellees.

Gerald J. Hallstead, referee pro se.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an appeal by the State from a judgment of the district court for Saline County dismissing its petition in intervention in a partition suit by which it sought an order confirming the escheat of certain lands to the State that were involved in such proceeding.

The record shows that James Semrad died intestate in Saline County, Nebraska, on September 14, 1954. He was a widower at the time of his death and he left no issue or parent surviving. He left surviving a number of heirs all of whom were nonresident aliens residing in Czechoslovakia. The lands in question do not lie within the corporate limits of any city or village, or within 3 miles thereof, and are not therefore within the exception contained in section 76-414, R. R. S. 1943.

Section 76-401, R. R. S. 1943, provides: "Upon the failure of heirs, the title shall vest at once in the state, without an inquest or other proceedings in the nature of

office found." It is further provided by section 76-402, R. R. S. 1943: "Aliens and corporations not incorporated under the laws of the State of Nebraska are prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, except as provided in sections 76-403 to 76-405." This section precludes a nonresident alien from acquiring or taking any title or interest in lands in this state by descent, devise, purchase, or otherwise, except as to such lands as are within the exceptions provided in the act. State v. Toop, 107 Neb. 391, 186 N. W. 371; Metzger v. Metzger, 108 Neb. 613, 188 N. W. 229. We point out that there is no evidence in the record of a treaty between the United States and Czechoslovakia affecting the rights of the parties.

By escheat is meant a reversion or forfeiture of property to the state upon the happening of a designated chance event or default. It is one of the incidents of state sovereignty and it cannot be surrendered unless the intention to do so is clearly and unequivocally expressed. A failure of heirs is ordinarily the event which brings about an escheat to the state, but others may be provided by statute. The law of escheat must be complied with strictly, otherwise it will not be enforced. It seems clear, under the provisions of section 76-401, R. R. S. 1943, that, on the death of a citizen who leaves only alien kindred, his real property that is not within any of the exceptions specified by statute reverts to and vests in the state at the death of such citizen without the necessity of affirmative legal action as evidenced by the words "without an inquest or other proceedings in the nature of office found."

After the death of James Semrad a petition for the appointment of an administrator of his estate was filed on October 28, 1954. An administrator was duly ap-

pointed and, on August 7, 1958, a decree of final settlement was entered by the county court of Saline County. By this decree the heirs of James Semrad were determined and the residence of each shown to be in Czechoslovakia. The decree further provided that said lands should be assigned subject to the laws of the state requiring that such lands be sold by such alien heirs within 5 years from September 14, 1954, the date of the death of James Semrad.

The record further shows that the Attorney General of Nebraska was served with notice of the probate proceedings. On June 28, 1955, the State by the Attorney General intervened, asserting a reversion to the State by escheat. On July 10, 1958, the Attorney General withdrew the State's petition in intervention. The contention is advanced that the State lost any rights it may have had because of the filing and subsequent withdrawal of the State's petition in intervention.

There are at least three reasons why this position cannot be sustained: (1) Because the Attorney General has no authority to waive the rights of the State or to consent to the alienation of the vested interest of the State which it acquired on the death of James Semrad. State v. Lancaster County Bank, 8 Neb. 218; Chicago, B. & Q. R. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Custer County v. Chicago, B. & Q. R. R. Co., 62 Neb. 657, 87 N. W. 341; Anstine v. State, 137 Neb. 148, 288 N. W. 525; State ex rel. Goodsell v. Tunnicliff, 169 Neb. 128, 98 N. W. 2d 710. (2) Because the real estate escheated and reverted to the State by operation of law on the death of James Semrad. State ex rel. Roberts v. Reeder, 5 Neb. 203; In re Estate of O'Connor, 126 Neb. 182, 252 N. W. 826. (3) Because that while the decree of heirship may properly adjudicate who are the children or next of kin of the deceased, it does not determine the title to real estate, and adverse claims involving the title to real estate cannot be litigated in the proceeding. Fischer v. Sklenar, 101 Neb. 553, 163 N. W.

861; In re Heirship of Robinson, 119 Neb. 285, 228 N. W. 852; Edington v. Paulsen, 131 Neb. 198, 267 N. W. 422; Lutcavish v. Eaton, 166 Neb. 268, 89 N. W. 2d 44.

The record further shows that two of the alien heirs of James Semrad, on June 29, 1959, filed a partition suit in the district court for Saline County to procure an apportionment of the land among the foreign heirs according to their respective interests therein and, in case an apportionment could not be had without prejudice to the rights of such heirs, then for the sale thereof and a division of the proceeds in accordance with their respective interests. The proceeding resulted in a sale of the property to Warren H. Cerny and Joseph F. Belohlavy for $20,500. The sale was confirmed on August 4, 1959. The referee closed the transaction with the purchasers on September 2, 1959, at which time the purchase price was paid and deeds delivered. On September 11, 1959, the State by its Attorney General, with leave of court, filed its petition in intervention asserting that the lands escheated to the State and praying that the title thereto be quieted in the State. On September 9, 1959, the purchasers moved for an order vacating the order of distribution in favor of the alien heirs, which the court sustained on September 22, 1959. The proceeds of the sale still remain in the hands of the referee pursuant to such order awaiting the final determination of the litigation.

Under the authorities hereinbefore cited, the lands in question escheated to and vested in the State on the death of James Semrad. The State has not been made a party to any action having the effect of divesting the State's interest therein. We necessarily conclude that the State is the owner of the lands involved and that the trial court erred in dismissing its petition in intervention.

It is the contention of the appellees that the words "upon the failure of heirs," contained in section 76-401, R. R. S. 1943, should be literally construed to mean when there are no heirs irrespective as to whether or

not they are competent to take as heirs and, where there are heirs even though they be nonresident aliens, the title does not vest immediately upon the death of the owner. We cannot accept this argument. The words "failure of heirs" contained in section 76-401, R. R. S. 1943, mean an absence of heirs competent to take by descent or devise. Construing the applicable statutes pari materia (sections 76-401 and 76-402, R. R. S. 1943), an alien heir who cannot take by purchase cannot take by descent or devise. If the Legislature had intended that an escheat to the state would occur only when there were no heirs, it would have been a simple matter to have so stated. By using the term "failure of heirs," it clearly meant an absence of heirs capable of taking by descent or devise.

Appellees further contend the sale of the lands, the delivery of the deeds, and the payment of the purchase price before the State asserted its claim of title by escheat, made the transfer of title by the referee valid. It is valid, they contend, because of the failure of the State to take legal action before a sale and conveyance of the land for value to a competent titleholder. We reiterate, however, that no action to establish the vesting by escheat is required when the case falls within section 76-401, R. R. S. 1943. It is only when alien heirs take some interest in land under the exceptions and provisos of the act that legal action is required to divest such interest upon a default. This is evidenced by the fact that section 76-408, R. R. S. 1943, provides "Whenever any such lands shall revert and escheat to the State of Nebraska, as provided in sections 76-403, 76-405 and 76-411," the county attorney shall proceed against the alien for the purpose of having the forfeiture declared. Appellees contend, however, that the original act used the words "as provided in this act" and that the Revisor of Statutes changed the meaning of the act in specifying sections 76-403, 76-405, and 76-411, R. S. 1943, in the 1943 revision. See Laws 1911,

c. 100, p. 365. The meaning of the act was not changed. To hold otherwise would render section 76-401, R. R. S. 1943, a meaningless provision. The acts governing escheats must be construed together and effect given to each provision if it is possible to do so. Section 76-408, R. R. S. 1943, clearly refers to the exceptions and provisos of sections 76-403, 76-405, and 76-411, R. R. S. 1943, and not to section 76-401, R. R. S. 1943, which provides for the vesting of title in the state without legal action. In any event, the Legislature reenacted section 76-408, R. R. S. 1943, in its present form when it adopted and included the questioned language in a general revision of the statutes. McGraw Electric Co. v. Lewis & Smith Drug Co., Inc., 159 Neb. 703, 68 N. W. 2d 608; Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420.

Appellees rely upon Lord v. Shultz, 115 Neb. 33, 211 N. W. 210, 62 A. L. R. 489, to support the foregoing contention. In that case a foreign corporation accepted deeds to 360 acres of land in full payment of a mortgage which it held on 200 acres of it. The foreign corporation then conveyed the 360 acres of land to the plaintiff in the action. It is clear that the title to the 200 acres of land upon which the foreign corporation had a mortgage could be held by the foreign corporation under the provisions of section 76-411, R. R. S. 1943, formerly section 5690, Comp. St. 1922, as the opinion indicates. Appellees contend that the holding of the conveyance of the 160 acres by the foreign corporation valid sustains the validity of the conveyance by the referee in the present case. The situations are not identical as the appellees contend. There is no provision in the statutes providing for an immediate vesting of the title when a foreign corporation purports to take the title, such as is found in section 76-401, R. R. S. 1943, upon a failure of heirs. No reference is made to foreign corporations in that section and necessarily it has no application to foreign corporations. The case is clearly distinguishable.

Appellees further contend that section 76-612, R. R. S. 1943, lends support to their contentions. This section provides a statutory standard for the examining of abstracts of title. It provides in part: "Where title to real estate was held by a foreign corporation or by an alien and it does not appear from the records that the state has instituted proceedings to take advantage of the statutory restrictions on holding of land by such parties and corporation or alien has transferred the title to one capable of receiving and holding it, the title examiner should pass the title." This provision applies to aliens who obtain an interest in land which is subject to reversion to the state upon default of statutory conditions attached to the holding of such interest. It does not even purport to aid a conveyance of title by an alien who never had any interest in the property which the alien purported to convey. It will be observed that as the land in question vested in the State on the death of James Semrad, the alien heirs never had an interest in the land and section 76-612, R. R. S. 1943, has no application since it in terms relates only to real estate held by an alien. The section necessarily applies only to real estate held by alien heirs under the exceptions and provisos of the escheat statutes.

Appellees contend that the delay of the State in filing its petition in intervention is fatal to its position. As we have heretofore stated, appellees had no interest in the land in question since it vested in the State on the death of James Semrad, by virtue of section 76-401, R. R. S. 1943. The attempt of appellees to partition or sell the land was, reduced to the simplest of statements, an attempt to partition and sell the property of the State. The State was not made a party to the partition suit and the court's judgment was void. A void judgment may be set aside by the court rendering it at any time, whether at or after the term at which it was entered. The judgment for the partition of the land being void, this court is required to set it aside on ap-

peal. The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

GLENN O. JOURDON, APPELLANT, V. THE COMMONWEALTH COMPANY, A CORPORATION, APPELLEE.
104 N. W. 2d 681

Filed August 19, 1960. No. 34626.

SUPPLEMENTAL OPINION

APPEAL from the district court for Lancaster County: JOHN L. POLK, JUDGE. On motions for rehearing. See 169 Neb. 482, 100 N. W. 2d 84, for original opinion. *Former opinion modified. Motions for rehearing overruled. Affirmed in part, and in part reversed and remanded with directions.*

Ewald D. Warnsholz, for appellant.

Ginsburg, Rosenberg & Ginsburg and *Norman M. Krivosha,* for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

BOSLAUGH, J.

A further consideration of this case after the submission of motions for rehearing has convinced that parts of the syllabus and opinion reported as Jourdon v. Commonwealth Co., 169 Neb. 482, 100 N. W. 2d 84, are inapplicable to this case and that the following parts of the syllabus and opinion should be and they are withdrawn:

1. Paragraphs numbered 1 to 5, inclusive, of the syllabus.

2. The part of the opinion as it appears in the official report above cited concerning the first cause of

action of the second amended petition of appellant immediately following the quotation from section 8-432, R. R. S. 1943, on page 488 of the official report, to and including the first full paragraph near the top of page 494 of the official report.

There should be and is substituted in lieu of the matter withdrawn as described in paragraph numbered 2 above what is hereafter stated as a part of the opinion concerning the first cause of action of the second amended petition of appellant: The principal of each of the six promissory notes given by appellant to appellee involved and described in the first cause of action of the second amended petition of appellant is for a greater amount than $550. The rate of charges on the unpaid principal balance until maturity of each of the notes was the maximum allowed to be charged by an industrial loan and investment company. Maximum interest charges were made simultaneously on the obligations of appellant to appellee existing at the same time as follows: From April 17, 1954, until June 24, 1954, on notes 1 and 2; from June 24, 1954, until August 3, 1954, on notes 1, 2, and 3; from August 3, 1954, until August 7, 1954, on notes 1, 2, 3, 4, and 5; from August 7, 1954, until November 15, 1954, on notes 3, 4, and 5; and from November 15, 1954, until July 26, 1955, on notes 4 and 6.

The district court found concerning the first cause of action of the second amended petition of appellant that appellee did not induce or permit appellant to become obligated by more than one contract of loan at the same time for the purpose of appellee obtaining a higher rate of charge or interest than would have been permitted if all the obligations of appellant to appellee had been consolidated into one obligation, in violation of the applicable statute; that appellee desired to and did offer to consolidate the obligations of appellant into a single one but appellant requested and insisted that each loan be made separately; that the parties were in agree-

ment on separating the loans appellant had contracted at various times with appellee; that appellee had no unlawful intent and purpose interdicted by the applicable statute in connection with any of the loans involved herein and there was no violation of law by appellee; that the loans concerned in this cause were each solicited by appellant for his benefit and advantage and he cannot now complain thereof or take advantage of appellee by reason of acts committed by it at the request of appellant and for his advantage; and that appellee did not exact any charges in excess of those prescribed by section 8-418, R. R. S. 1943. The judgment of the trial court was a dismissal of that cause of action of appellant.

The first loan by appellee to appellant was made April 8, 1954, and it was due June 8, 1954. It was paid August 7, 1954. The second loan by appellee to appellant was made April 17, 1954, was due June 17, 1954, and was paid to appellee August 7, 1954. These two loans concerned the automobile business of appellant. The third loan by appellee to appellant was made June 24, 1954. It concerned the nursing home business conducted by appellant. It was due August 24, 1954. Appellee offered evidence that when the third loan was applied for and was being negotiated, it proposed that the previous loans to appellant be consolidated with the third loan appellant had applied for but appellant asserted he wanted to keep the loans separate as the first two loans mentioned were in reference to his automobile business and the third was a part of his nursing home activity. Appellee produced evidence that its transactions with appellant were represented by several loans and separate notes at his specific request and for his special accommodation. This does not explain why appellee had prior to that time taken two separate obligations of appellant each for more than $550 only 10 days apart, each with maximum interest charges, and each of which concerned his automobile business. Appellant testified he did not recall a request by appellee

to consolidate the loans made to him and that he did not refuse at any time to make the loans into one obligation.

Appellee says the several loans and a separate note representing each were made at the request and to accommodate appellant and not for the purpose of obtaining a higher rate of charge than would have been lawful if they had represented one obligation. The six notes concerned in the first cause of action each provided for graduated interest rates at the maximum permitted by law. If appellee had desired a proper arrangement it could have provided for 9 percent interest on any note executed by appellant during the time a previous note of his was unpaid. The prohibition of the statute is not that there shall not be more than one loan during any period of time but it is that there shall not be charged 36 percent on the first $50 of unpaid principal and 18 percent on the next $500 of unpaid principal on more than one loan at the same time. § 8-418, R. R. S. 1943. There may be as many contracts of loan at the same time as the parties desire but the several loans when considered together must not violate section 8-419, R. R. S. 1943.

Appellee argues that to be a violation of the statute it must be found as a matter of fact that the object of the lender in permitting more than one loan of a single borrower to exist at the same time was to obtain a higher rate of interest than would be lawful if there was but a single obligation. It is true that the statute prohibits an industrial loan and investment company from allowing any borrower to become obligated to it under more than one contract of loan at the same time for the purpose of obtaining a higher rate of interest than would be permitted if all the obligations of the borrower were consolidated into one obligation. A consideration of the acceptance by appellee of six separate obligations of appellant, each providing for maximum interest charges and as many as five of them existing simultaneously, two of which were made in one month,

two of which were executed on the same day, and all incurred within a period of less than 9 months, makes it permissible if not inescapable to find that the obligations of the borrower were made in that manner because of the higher rate of interest charged thereon and realized therefrom. The conceded acts of appellee speak more convincingly than its explanation of the reason for the acts. Appellee asserts that the multiple obligations of appellant were induced by him for his sole benefit and by his request, solicitation, and direction to enable him to conveniently carry on his business engagements and activities and not for the advantage of appellee but in opposition to the suggestion and desire of appellee that the obligations be consolidated into one. Appellee argues that simply splitting loans and charging lawful rates on each loan if not done to obtain a higher rate of charge than is permitted by law is not a violation thereof but to have that effect it is necessary that a single transaction be divided for the purpose of obtaining a higher rate of interest. The statute does not prevent the making of more than one loan to a borrower at the same time. It does condemn charging maximum interest prescribed by section 8-418, R. R. S. 1943, on the unpaid principal of more than one loan made to a borrower and existing at the same time for the purpose of obtaining a higher rate of charge. The prohibition of the statute is that the loan company shall not permit any person to become obligated on more than one contract of loan at the same time if the purpose therefor is a higher charge than if there was only a single obligation. The statute requires the loan company to be unyielding to any entreaty of the borrower that the company violate this prohibition. If the proffered justification offered by appellee in this case is a valid one, the statute would be, for all practical purposes, ineffective. It could always be claimed when there were two or more obligations, as it is represented

in this case, that each loan was made for the purpose of assisting or accommodating the borrower by complying with his desire and request.

Appellee argues in support of the judgment of dismissal by the trial court of the first cause of action of the second amended petition of appellant that it is correct because the cause of action was for the recovery of a forfeiture and a penalty; that any cause of action therefor accruing more than 1 year before the commencement of this action was required by the statute to have been instituted, if at all, within 1 year from the date of the accrual of any cause of action therefor; and that the alleged cause of action of appellant was barred by the statute of limitations.

Four of the first five loans made by appellee to appellant and the notes given by the latter to the former representing such loans as described and identified in the first cause of action were paid and fully discharged by him more than 1 year before the commencement of this action and not later than November 15, 1954. The action was commenced by appellant on December 10, 1955. The fourth loan and the note representing it as described in the first cause of action herein was paid and discharged on July 26, 1955. The sixth loan and the note representing it as described in the first cause of action herein was paid and discharged August 2, 1955. The relevant part of section 25-208, R. R. S. 1943, states: "The following actions can only be brought within the periods herein stated: Within one year, * * * an action upon a statute for a penalty or forfeiture * * *."

The argument of appellee in this regard cannot be accepted. It is contrary to what is said and decided in Abel v. Conover, *post* p. 926, 104 N. W. 2d 684, as follows: "In McNish v. General Credit Corp., *supra* (164 Neb. 526, 83 N. W. 2d 1), plaintiff brought a suit to void an installment loan contract because of excessive

interest charges therein as limited by section 45-138, R. S. Supp., 1953, and to recover back the payments made thereon by the plaintiff. * * * Applicable statutes are therein cited to the effect that such a loan is void and that the licensee shall have no right to collect or receive any principal, interest, or charges on such loan. This court concluded, from the language used in the statute, that the Legislature intended that a lender should have nothing in such a situation and that the borrower should have a judgment for the payments made. The effect of the statute as thus construed is that the purchaser retains the subject of the purchase, the note given in payment is void and uncollectible, and the purchaser is entitled to recover back any payments made thereon. Is the action to recover back the payments made an action to recover a penalty? We think not. The suit is not one for the recovery of damages. It is for the recovery of money actually paid to a licensee under a void installment loan which the licensee under the statute was not authorized to collect or to receive any payment thereon. * * * Under a statute making a contract void that is not in compliance therewith, and providing that it is unlawful to collect or receive payments thereof, an action to recover payments unlawfully received is not an action to recover a penalty. It is simply an action to recover money had and received, having none of the attributes of an action for the recovery of a penalty."

The entire last paragraph of the opinion as it appears in the official report is withdrawn and there is substituted in lieu thereof the following: The judgment should be and it is reversed and the cause is remanded with directions to the district court for Lancaster County to render a judgment against appellee in favor of appellant for the amount actually paid by him upon the six promissory notes described in the first cause of action of the amended petition with interest at 6 percent

per annum upon each installment paid by appellant to appellee from the date of the payment thereof.

FORMER OPINION MODIFIED.
MOTIONS FOR REHEARING OVERRULED.
AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

ROBERT ABEL, APPELLANT AND CROSS-APPELLEE, V. J. CEDRIC CONOVER, APPELLEE AND CROSS-APPELLANT.
104 N. W. 2d 684

Filed August 19, 1960. No. 34787.

1. **Damages.** In this state the measure of recovery in all civil actions is compensation for the injury sustained.
2. **Constitutional Law: Damages.** A statute which provides for more than compensatory or actual damages to be paid to an individual is in excess of legislative authority and is unconstitutional.
3. **Fines: Penalties.** Where a statute imposes liability for actual damages and also imposes additional liability for the same act, such additional liability is a fine or a penalty.
4. **Constitutional Law: Penalties.** A statute which provides for a penalty to be paid to the injured party is violative of Article VII, section 5, of the Constitution.
5. **Damages: Penalties.** A statute providing for liquidated damages, though in the form of a penalty, will be upheld if the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible of measurement by ordinary pecuniary standards.
6. **Constitutional Law: Penalties.** Section 7-106, R. R. S. 1943, insofar as it provides for the recovery of treble the actual damages sustained by the injured party, is violative of Article VII, section 5, of the Constitution, in that it authorizes the recovery of a penalty by a private individual.
7. **Penalties: Forfeitures.** Arthur v. Trindel, 168 Neb. 429, 96 N. W. 2d 208, and School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24, distinguished.
8. ———: ———. McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1, distinguished, and in part overruled.
9. **Election of Remedies.** Where an action under a statute is a

cumulative or alternate remedy to one available at common law, an election of remedies is involved. In such a case a party may not plead a cause of action under the statute and, failing that, rely upon the common law remedy.

APPEAL from the district court for Scotts Bluff County: NORRIS CHADDERDON, JUDGE. *Affirmed.*

Andrew K. Parkansky and *Peter E. Marchetti,* for appellant.

Neighbors & Danielson, for appellee.

Heard before CARTER, MESSMORE, YEAGER, CHAPPELL, WENKE, and BOSLAUGH, JJ.

CARTER, J.

This is an action to recover treble damages, under section 7-106, R. R. S. 1943, for fraud and deceit on the part of the defendant while acting as city attorney of Bridgeport, Nebraska, as county attorney of Morrill County, Nebraska, and as an attorney at law. The trial court sustained the motion of the defendant for a judgment on the pleadings, and plaintiff has appealed.

The petition alleges in substance that on or about February 17, 1955, defendant was engaged by plaintiff's wife to represent her in a suit for a divorce against the plaintiff. On February 18, 1955, plaintiff was imprisoned in the city jail of the city of Bridgeport for a perod of 5 days, and on February 23, 1955, he was imprisoned in the county jail of Morrill County for 2 days. The plaintiff was not charged with any criminal offense prior to his dismissal from the county jail. The plaintiff alleged that the defendant, under the pretext that he was acting in his official capacity, fraudulently procured a deed and a bill of sale of his property to plaintiff's wife, he not knowing that defendant was about to file a suit for divorce in her behalf. He also alleged that defendant induced him to sign voluntary commitment papers for commitment of plaintiff to the Hastings State Hospital. It was further alleged that defendant did on February

24, 1955, file a divorce petition for plaintiff's wife and obtained a decree of divorce in which the deed, bill of sale, and other papers so obtained, were used as evidence. Plaintiff appealed from the divorce decree to this court. Abel v. Abel, 168 Neb. 488, 96 N. W. 2d 276. Plaintiff alleged that the fraud and deceit of the defendant caused him great mental anguish and deprived him of his property and standing in the community. He alleged that the conduct of defendant caused him to forfeit to plaintiff treble damages as provided by section 7-106, R. R. S. 1943. He prayed for damages in the amount of $150,000.

Defendant alleged in his answer, insofar as it is pertinent to this appeal, that section 7-106, R. R. S. 1943, is violative of Article VII, section 5, of the Constitution of Nebraska, and that the action is barred by section 25-208, R. R. S. 1943, a 1-year statute of limitations.

The trial court held that section 7-106, R. R. S. 1943, insofar as it provides that an attorney shall forfeit to the injured party treble damages to be recovered in a civil action, is violative of Article VII, section 5, Constitution of Nebraska, and thereupon sustained defendant's motion for a judgment on the pleadings.

It is the contention of the defendant that section 7-106, R. R. S. 1943, is unconstitutional in that it violates Article VII, section 5, of the Nebraska Constitution. This statute provides: "An attorney and counselor who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages to be recovered in a civil action." It is argued that the provision that the guilty party shall forfeit to the injured party treble damages constitutes it a penalty and not a provision for liquidated damages, and consequently is void.

There is confusion in the cases as to the meaning of the words "fines, penalties, and license money" contained in Article VII, section 5, of the Constitution,

which provides: "All fines, penalties, and license money, arising under the general laws of the state, * * * shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, * * *."

It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained. This rule is so well settled that we dispose of it merely by the citation of cases so holding. Boyer v. Barr, 8 Neb. 68, 30 Am. R. 814; Atkins v. Gladwish, 25 Neb. 390, 41 N. W. 347; Bee Publishing Co. v. World Publishing Co., 59 Neb. 713, 82 N. W. 28; Wilfong v. Omaha & C. B. St. Ry. Co., 129 Neb. 600, 262 N. W. 537.

In School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24, this court held: "The words 'fines, penalties, and license moneys,' as used in section 5, article VII, of the Constitution, refer to and include fines imposed in the punishment of crimes and misdemeanors, exactions imposed for violations of ordinances and regulations growing out of the exercise of the police power and having the characteristics of a criminal proceeding, and generally speaking, such license fees as may be imposed upon businesses which by their nature require police regulation by the state and its governmental subdivisions." This interpretation of the constitutional provision was adhered to in School District of McCook v. City of McCook, 163 Neb. 817, 81 N. W. 2d 224; and Arthur v. Trindel, 168 Neb. 429, 96 N. W. 2d 208. We adhere to those decisions. The case be-

fore us is not controlled by those cases.

The defendant contends that section 7-106, R. R. S. 1943, provides for the collection of a penalty by an individual and is unconstitutional for that reason. The plaintiff asserts that the statute is remedial and within the power of the Legislature to enact. This question has been before this court many times with varying results. The genesis of the problem is in Atchison & Nebraska R. R. Co. v. Baty, 6 Neb. 37, 29 Am. R. 356, and Graham v. Kibble, 9 Neb. 182, 2 N. W. 455. Numerous cases followed these decisions in point of time which were not consistent with either or both of them. The question came squarely before the court in Sunderland Bros. Co. v. Chicago, B. & Q. R. R. Co., 104 Neb. 319, 177 N. W. 156, on rehearing, 104 Neb. 322, 179 N. W. 546. The holdings of that case are: A statute which imposes a liability for actual damages and in addition thereto a penalty to be paid to the injured party is repugnant to section 5, Article VIII, now Article VII, of the Constitution, which requires all fines and penalties arising under the general laws to go exclusively to the school fund. A statute which imposes liability for actual damages and additional liability for the same act provides a penalty.

The distinction between provisions providing for penalties and those providing for liquidated damages has been stated by this court to be as follows: "In construing a contract to determine whether or not a provision therein for the payment of a stipulated sum in case of default by one of the parties is to be considered as a penalty or liquidated damages, the court will consider the subject-matter, the language employed, and the intention of the parties. If the construction is doubtful, the agreement will be considered a penalty merely. If damages result from the performance or omission of acts, which damages are certain or can be ascertained by evidence, the stipulated sum is considered as a penalty; but where the acts or omissions occasioning

damages are not susceptible of measurement by a pecuniary standard, the sum stipulated ordinarily will be regarded as liquidated damages." Brennan v. Clark, 29 Neb. 385, 45 N. W. 472. See, also, Haffke v. Coffin, 89 Neb. 134, 130 N. W. 1045; Sunderland Bros. Co. v. Chicago, B. & Q. R. R. Co., *supra*.

"The purpose of liquidated damages is to furnish compensation for an injury sustained, and, if the amount provided does not bear a reasonable relation to the damage which might be contemplated by the parties, or if it is apparent that it was intended to more than cover that damage, and is not compensatory merely, then it must be construed as a penalty." Sunderland Bros. Co. v. Chicago, B. & Q. R. R. Co., *supra*.

It is clearly within the province of the Legislature to provide for liquidated damages in favor of a private person, although in form a penalty, if the amount provided bears a reasonable relation to the actual damages which might be sustained and which damages are not susceptible of measurement by ordinary pecuniary standards. But where it appears that the provision provides for the payment of an amount clearly in excess of compensatory damages, it is a penalty and violates the due process clause of the Constitution when considered with Article VII, section 5, thereof. While there is respectable authority from other jurisdictions that providing liquidated damages in favor of a private person in excess of those which are termed compensatory does not violate the due process and equal protection clauses, such has not been the holding when the Constitution contains a provision similar to that in Article VII, section 5, of the Constitution. This question was determined in Cairo & St. Louis R. R. Co. v. Peoples, 92 Ill. 97, 34 Am. R. 112 (which was quoted with approval in the Sunderland case), in the following language: "The case of Atchison and Nebraska Railroad Co. v. Baty, 6 Neb. 37, cited, can not be regarded as a controlling authority. That case seems to regard 'double damages' for stock

killed or injured as purely a penalty,—a proposition to which we can not fully yield our assent. Considering double damages as penalty, the conclusion reached by the court in the case cited was inevitable, as the constitution of that State, as the opinion declares, provides, that 'all fines and penalties * * * shall be appropriated exclusively to the use and support of common schools,' and hence the decision that no private individual could recover the penalty. But we have no such constitutional provision in this State, and, besides, the damages given by statute in such cases are not exclusively penalty, but are to be regarded as compensation as well as penalty, and may, therefore, be recovered in the name of the owner of the stock. Clearly, it is nothing more than a remedy given by statute for injury done to the property of the citizen, which, it is understood, it is competent at all times for the legislature to provide."

Whether or not the granting of double or treble damages is in violation of the due process clause standing alone, it is a violation of such clause when considered with Article VII, section 5, of the Constitution. Since all penalties must go to the benefit of the common schools of the state, a penalty for the benefit of a private person is violative of the cited constitutional provisions.

A statute such as section 7-106, R. R. S. 1943, which provides that the party committing the wrongful act shall forfeit to the injured party treble damages to be recovered in a civil action, authorizes the collection of a penalty. The effect of the statute is to authorize the actual compensatory damages to be determined, and then arbitrarily requires the defendant to pay to the plaintiff three times that sum. It therefore exceeds compensatory damages three times over and is a penalty prohibited by the due process clause, Article I, section 3, and Article VII, section 5, of the Constitution of Nebraska.

Arguments have been advanced by text writers and case reviewers that compensatory damages include not

only the actual damages sustained, but include actual cumulative harm and incentive liability. The adoption of such a theory as reason for sustaining double and treble damages to private persons would inject into the law a recovery of damages for reasons that were purely speculative and conjectural. It would be an excuse for permitting punitive and exemplary damages, the recovery of which has been consistently condemned by the law of this state. We find no logic in the argument that a statute may properly permit the recovery of such damages in view of our cited constitutional provisions prohibiting penalties in favor of private persons. If any such damages could be established, they must be recovered as actual compensatory damages.

We necessarily conclude that penalties in favor of private persons are prohibited by the two cited sections of the Constitution. This necessarily requires us to hold that the recovery of double or treble damages, that is, damages which double or treble the actual compensatory damages established, are in contravention of the same sections of the Nebraska Constitution. We consequently hold that section 7-106, R. R. S. 1943, insofar as it provides for treble damages, likewise is violative of the cited sections of the Constitution.

The plaintiff contends that the constitutionality of section 7-106, R. R. S. 1943, is sustained by Arthur v. Trindel, *supra;* McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1; and School District of the City of Omaha v. Adams, *supra.* Before reviewing these cases we point out that the case of Sunderland Bros. Co. v. Chicago, B. & Q. R. R. Co., *supra,* considered the same principle we have before us in the case at bar. The decisions of this court prior to that time were reviewed therein and the contentions of this plaintiff were advanced in that case and supported by a vigorous dissent. The majority opinion of the court in the Sunderland case has not been overruled or modified. We adhere to the principles announced in that case. It would serve no

purpose to again review the decisions of this court prior to the Sunderland case on the question before us.

In Arthur v. Trindel, *supra,* the action was brought by a taxpayer of the city of Beatrice against the defendant to recover money paid him for services and materials furnished the city while he was a salaried member of the city's board of public works. The court held that the action was remedial and not one to recover a penalty. This conclusion is correct for this reason: The statute, which was declaratory of the common law, condemns transactions by a person with a city while he is serving as an officer of the latter because of his conflict of interest, and gives him no cause of action against the city for services rendered or materials furnished to the city while serving the city. Any payment made to him for services and materials is therefore an unlawful expenditure of the city's funds which may be recovered back by the city, or by a taxpayer in its behalf. It is in no sense for the recovery of a penalty and is an action to recover money unlawfully expended by the city which it had no authority to pay. It has no controlling effect on the case before us.

In McNish v. General Credit Corp., *supra,* plaintiff brought a suit to void an installment loan contract because of excessive interest charges therein as limited by section 45-138, R. S. Supp., 1953, and to recover back the payments made thereon by the plaintiff. This court held that the action was for the recovery of "a fine, forfeiture, or penalty, imposed by a statute" for purposes of jurisdiction. It further held that it was not a fine or penalty within the meaning of Article VII, section 5, of the Constitution. Applicable statutes are therein cited to the effect that such a loan is void and that the licensee shall have no right to collect or receive any principal, interest, or charges on such loan. This court concluded, from the language used in the statute, that the Legislature intended that a lender should have nothing in such a situation and that the borrower should

have a judgment for the payments made. The effect of the statute as thus construed is that the purchaser retains the subject of the purchase, the note given in payment is void and uncollectible, and the purchaser is entitled to recover back any payments made thereon. Is the action to recover back the payments made an action to recover a penalty? We think not. The suit is not one for the recovery of damages. It is for the recovery of money actually paid to a licensee under a void installment loan which the licensee under the statute was not authorized to collect or to receive any payment thereon. The fixing of maximum rates of interest to be charged to avoid usury is a proper legislative function. Pursuant to such power it has fixed the maximum rate to be charged generally at 9 percent per annum. Under the Installment Loan Act, however, the Legislature has authorized interest charges greatly in excess of the 9 percent rate, but has circumscribed the charging of these higher rates with regulations which are strict in form and impose severe consequences in case of violation. One of the consequences in case of violation is that the installment loan contract is void and it is unlawful for the licensee to collect or receive any payments of principal, interest, or charges thereon. It provides an effective method of combatting unlawful and unconscionable interest charges which is clearly within the province of the Legislature to do. In ordinary transactions, where interest in excess of 9 percent per annum is charged, the lender may collect the principal but may not collect the interest. The power of the Legislature to so provide as a deterrent to the charging of usurious rates of interest has never been questioned. The situation is no different in this instant case except in degree. We are of the opinion that the Legislature under the police power, when it authorizes rates of interest otherwise usurious, may, in order to obtain strict compliance, in case of the violation of the statute, invalidate the obligation in whole or in part, and divest

the lender of his right to collect or receive payments thereof. It is within the power of the Legislature, when operating within the police power, to create liabilities and forfeitures for the violation of its enactments, if they do not violate constitutional provisions, for the purpose of insuring compliance therewith. Such enactments, otherwise properly enacted, do not violate the due process clause. The wisdom of such legislation is for the Legislature and not the courts. Under a statute making a contract void that is not in compliance therewith, and providing that it is unlawful to collect or receive payments thereof, an action to recover payments unlawfully received is not an action to recover a penalty. It is simply an action to recover money had and received, having none of the attributes of an action for the recovery of a penalty. While the action is in practical effect punitive as to the lender, it is in fact a forfeiture sustained by him in failing to comply with applicable usury statutes which void the usurious contract and provide that he shall forfeit principal, interest, and charges for so doing. We think that the statute is a proper exercise of the police power of the state and its enforcement by a suit to recover back principal or interest paid contrary to the provisions of the act does not involve the collection of a penalty contemplated by Article VII, section 5, of the Constitution.

Our finding that the action to recover payments made on the void installment loan contract is not a suit to recover a penalty is inconsistent with the holding in the McNish case that it was a suit for the recovery of a penalty for the purpose of jurisdiction under section 25-404, R. R. S. 1943. Our holding in the present case leaves the holding in the McNish case in the inconsistent position of declaring the action one for a penalty for the purpose of jurisdiction and that it was not an action to recover a penalty in order to escape unconstitutionality. The assumption that the action was for the re-

covery of a penalty is an erroneous one and the holding of that case to the effect that the district court for Cheyenne County had jurisdiction because the action was for the recovery of a penalty appears to be an improvident one. We overrule that part of the McNish case. So construed, the McNish case affords no comfort to the plaintiff in the instant case.

The case of School District of the City of Omaha v. Adams, *supra,* involved quite a different situation. It was a suit involving the 50 percent penalty for failure to list certain property for taxation. Taxation is the sole source of revenue to sustain the government. The listing of property for taxation is an essential step in the process of obtaining such revenue. It is a sovereign power by the exercise of which a government sustains itself. Measures enacted pursuant to this sovereign power of taxation, which are coercive and punitive, and which tend to procure the listing of all property for taxation, are sustainable as a proper exercise of that sovereign authority. As we said in the Adams case, the penalty for failure to list property for taxation is punitive as to the wrongdoer, but it is also compensatory to the state and the subdivisions thereof entitled to share in the tax for the delay caused by the failure to list for assessment purposes and the consequent derangement of tax records and collection processes. It necessarily involves considerations that play no part in a case where a private individual seeks to recover damages in excess of actual, compensatory damages. The case lends no support to plaintiff's contentions in the case now before us.

We conclude that section 7-106, R. R. S. 1943, insofar as it provides for treble damages, is violative of Article I, section 3, and Article VII, section 5, of the Nebraska Constitution.

The plaintiff next asserts that a statute which is declaratory of the common law does not divest the common law action. From this it is argued that even if

section 7-106, R. R. S. 1943, is unconstitutional, the petition states a cause of action under the common law and the motion for judgment on the pleadings was therefore erroneously sustained.

We are in accord with the view that a statute which merely recodifies a common law action, and does not purport to create a new statutory action, leaves the plaintiff in a position where an election of remedies is not required. State ex rel. Love v. Cosgrave, 85 Neb. 187, 122 N. W. 885, 26 L. R. A. N. S. 207. In Smith v. Chicago, St. P., M. & O. Ry. Co., 99 Neb. 719, 157 N. W. 622, this court held that when a statute provides a new and additional remedy to that provided at common law, the common law remedy is not divested, and both remedies are available to the injured party. But that is not the situation here. At common law an attorney is liable for deceit and collusion and for his malicious and tortious acts. The statute before us provided for treble damages in cases where it was "with intent to deceive a court, or judge, or a party to an action or proceeding," a distinct limitation upon the common law rule. The plaintiff sought to plead facts which would entitle him to treble damages and not merely actual damages. It is the general rule that one who seeks to recover liquidated damages waives his right to actual, compensatory damages and vice versa. Smith v. Chicago, St. P., M. & O. Ry. Co., *supra*. It is an election of remedies between two distinct causes of action. We think the announced rule of the Pennsylvania court in Hall v. Pennsylvania R. R. Co., 257 Pa. 54, 100 A. 1035, L. R. A. 1917F 414, is the correct declaration of the law. The court said: "An action under a statute like the one in question is brought to recover the penalty imposed by the act, and an amendment changing the form of action from one at common law to an action under the statute for a penalty has been uniformly considered by our courts as setting up a new cause of action, * * *."

We necessarily conclude that the plaintiff may not

plead a cause of action for treble damages under section 7-106, R. R. S. 1943, and subsequently rely on the general common law liability; certainly not without amending his pleading in accordance with the rules of practice in this state.

The petition shows that there was no suit pending when the acts complained of were committed. The case is not brought within the scope of section 7-106, R. R. S. 1943, even if the treble damage provision were constitutional. The petition was demurrable and the trial court did not err in sustaining the motion for a judgment on the pleadings.

AFFIRMED.

WENKE, J., concurring.

I concur in the result reached by the court but, for reasons hereinafter set forth, do not agree with the court's holdings in certain respects.

The court holds that the provisions of section 7-106, R. R. S. 1943, providing for treble damages, is violative of Article I, section 3, and Article VII, section 5, of the Constitution of Nebraska. I agree that such provision is unconstitutional for the reason that the Constitution of Nebraska does not permit the recovery of punitive, vindictive, or exemplary damages by individuals in civil cases. See cases cited in the court's opinion. However, I would not agree that all remedial statutes establishing the right of individuals to recover fixed amounts as liquidated damages in civil matters, although in the form of a penalty, necessarily come under the provisions of Article VII, section 5, of the Constitution of Nebraska. See, Graham v. Kibble, 9 Neb. 182, 2 N. W. 455; Clearwater Bank v. Kurkonski, 45 Neb. 1, 63 N. W. 133; Hier v. Hutchings, 58 Neb. 334, 78 N. W. 638; Everson v. State, 66 Neb. 154, 92 N. W. 137; Cram v. Chicago, B. & Q. Ry. Co., 84 Neb. 607, 122 N. W. 31, 26 L. R. A. N. S. 1022; Smith v. Chicago, St. P., M. & O. Ry. Co., 99 Neb. 719, 157 N. W. 622. As most recently stated by this court in School District of the City of

Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24: "Clearly a statutory provision for liquidated damages in favor of a private person where it is not so oppressive as to offend constitutional requirements as to due process, although in the form of a penalty, does not create a penalty that must be appropriated to the use and support of the common schools within the meaning of section 5, article VII, of the Constitution. * * * In this respect the more strict definition of the word 'penalty' was intended, i.e. the pecuniary punishment inflicted by a law, ordinance, or police regulation for its violation. While the statute is punitive as to the wrongdoer, it is remedial as to the taxing bodies involved. Consequently, it is not solely a punitive statute. So regarded, the penalty is not one contemplated by section 5, article VII, of the Constitution as we have herein interpreted that section."

The court concludes there is an inconsistency in our holding in McNish v. General Credit Corp., 164 Neb. 526, 83 N. W. 2d 1, to the effect that we held therein that an action brought under the Installment Loan Act is not an action for the recovery of a penalty within the provisions of Article VII, section 5, of the Constitution of Nebraska, but is a penalty within the meaning of section 25-404, R. R. S. 1943, for the purpose of giving the district court for Cheyenne County jurisdiction of the subject matter. In McNish v. General Credit Corp., *supra*, we did hold, and I think properly so, that it was not an action to recover a penalty coming within the provisions of Article VII, section 5, of the Constitution of Nebraska. We therein also held as follows: "* * * the district court for that county had jurisdiction of the subject matter. See § 25-404, R. R. S. 1943. It provides in part: 'Actions for the following causes must be brought in the county where the cause or some part thereof arose: (1) An action for the recovery of a fine, forfeiture, or penalty, imposed by a statute, * * *.'" Without explanation it might appear that an inconsist-

ency exists and for that reason I agree that the basis for our holding therein needs clarification.

It will be noted that section 25-404, R. R. S. 1943, includes, as a basis for jurisdiction, "An action for the recovery of a * * * forfeiture, * * * imposed by a statute, * * *," a subject not dealt with by Article VII, section 5, of the Constitution of Nebraska. Webster's New Twentieth Century Dictionary (2d Ed.), p. 719, defines forfeiture as "the act of forfeiting; the losing of some right, privilege, estate, honor, office, or property, by an offense, crime, breach of condition, or other act." See, also, the definitions of forfeiture as given in Black's Law Dictionary (4th Ed.), p. 1290; Arthur v. Trindel, 168 Neb. 429, 96 N. W. 2d 208. As stated in the court's opinion herein, while discussing the causes of action involved in McNish v. General Credit Corp., *supra:* "While the action is in practical effect punitive as to the lender, it is in fact a forfeiture sustained by him in failing to comply with applicable usury statutes which void the usurious contract and provide that he shall forfeit principal, interest, and charges for so doing." Thus it becomes evident that the action in McNish v. General Credit Corp., *supra,* was for a forfeiture and not a penalty and that no inconsistency exists in our holding therein which needs to be overruled.

But let us consider the meaning of the word "penalty" as found in section 25-404, R. R. S. 1943. It is apparent the Legislature did not intend, by subdivision (1) of section 25-404, R. R. S. 1943, to cover the same subject matter as is dealt with by Article VII, section 5, Constitution of Nebraska, for the matter relates to "All fines, penalties and license money" while the former relates to "An action for the recovery of a fine, forfeiture, or penalty, imposed by *statute* * * *." (Emphasis mine.) Thus it becomes self evident to me that what the Legislature intended by using the word "penalty" in this statute was to give courts jurisdiction to enforce rights in civil matters which it had, by statute, given individuals

in the form of a penalty or penalties. While not material here, I think section 25-404, R. R. S. 1943, should be considered in pari materia with such statutes.

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1. Elements of defense of adverse possession stated. *Jones v. Schmidt* 351
2. In order to establish title by adverse possession it is not necessary that a party shall prove complete

enclosure nor that he remained continuously on the land for the statutory period, but only that the land was used continuously for the purposes to which it was by its nature adapted. *Jones v. Schmidt* 351

3. The statutory period for the establishment of title to real estate by adverse possession is 10 years. *Jones v. Schmidt* 351
4. A public highway may be established by prescription by continuous adverse use thereof by the public for a period of 10 years. *Kunz v. Bornemeier* 463
5. The title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continuous, notorious, and adverse possession thereof, claiming title to the same against all persons, for 10 years. *Bailey v. Karnopp* 836
6. The payment of taxes is an element and circumstance which may be considered together with all of the other circumstances of the case with respect to the subject of adverse possession. *Bailey v. Karnopp* 836

Appeal and Error.

1. Photographs are admissible in evidence where they may be regarded as instructive upon a question for determination, but if they are not so instructive it is error to admit them. *Patras v. Waldbaum* 20
2. An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to the Supreme Court. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
   Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106
   Union P. R. R. Co. v. State Board of Equalization & Assessment 139
3. A petition in error in a district court to test the validity of a final order of an inferior tribunal is an independent proceeding the object of which is to obtain a reversal of the order presented for review. *Anania v. City of Omaha* 160
4. In error proceedings to the district court, it is mandatory that the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed. *Anania v. City of Omaha* 160

5. In the absence of a transcript the court in which a petition in error is filed has no jurisdiction to proceed further than to dismiss the petition in error. *Anania v. City of Omaha* 160
6. If the judgment of a district court in a proceeding in error to reverse the final order of an inferior tribunal is sought to be reviewed in the Supreme Court, the transcript in the Supreme Court must contain the final order of the inferior tribunal and such other proceedings as are presented for review and correction. *Anania v. City of Omaha* 160
7. The jurisdiction of the district court to consider and set aside a final order of an inferior tribunal does not attach until there is presented to it with the petition in error a duly authenticated transcript of the proceedings containing the final order of which complaint is made. *Anania v. City of Omaha* 160
8. The words "a transcript of the proceedings," as employed to designate what shall be filed with the petition in error, include within their meaning duly authenticated copies of the original papers, pleadings, and final order of the inferior tribunal which it is sought to present to the appellate court. *Anania v. City of Omaha* 160
9. Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation. *Anania v. City of Omaha* 160
10. An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law. *Anania v. City of Omaha* 160
11. If a district court was without jurisdiction of the subject matter of litigation, the Supreme Court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein. *Anania v. City of Omaha* 160
12. A district court has the same power to hear and determine a petition for a new trial on the ground of newly discovered evidence after an appeal to the Supreme Court as it would have if no appeal had been taken. *Finnern v. Bruner* 170
13. A judgment will not be reversed for errors against a party not entitled to succeed in any event. *Muenchau v. Swarts* 209

14. A judgment will not be reversed for error in overruling a motion for a directed verdict at the close of plaintiff's case when certain essential testimony was not then in the record, when, at the time of renewing the motion at the close of all the evidence, such testimony is in the record and its admission is not assigned as error in the Supreme Court. *Sleezer v. Lang* 239
15. Except where jurisdiction is involved, the Supreme Court will consider on appeal only questions which have been presented to and passed upon by the trial court. *Sleezer v. Lang* 239
16. On appeal to the Supreme Court from an order of the Department of Water Resources, the primary questions to be determined are generally whether such department acted within the scope of its authority and whether its findings and order complained of are supported by competent evidence or are unreasonable and arbitrary. *Ainsworth Irr. Dist. v. Bejot* 257
17. One who concludes that his property has been excessively valued for taxation must apply to the county board of equalization to correct the error and, in case of an adverse determination, appeal therefrom. *Scudder v. County of Buffalo* 293
18. Statutory remedy of appeal from order of county board of equalization is full, adequate, and exclusive. *Scudder v. County of Buffalo* 293
19. Where property is excessively valued for taxation, or if prejudicial errors and irregularities intervened in the procedure of the county board of equalization, the statute affords a plain, adequate, speedy, and exclusive remedy which cannot be collaterally attacked unless the assessment or some part thereof is wholly void. *Scudder v. County of Buffalo* 293
20. It is not the province of the Supreme Court in law actions to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Haines v. State* 304
21. The Supreme Court will not disturb an order of the railway commission based on evidence unless the evidence shows that such order is unreasonable and arbitrary. *Burlington Truck Lines, Inc. v. Brown Transfer* 331
22. In order to obtain a bill of exceptions at the cost of the county, a defendant in a criminal case must

file a poverty affidavit within 1 calendar month after rendition of judgment or final order of which complaint is made. *Kennedy v. State* 348

23. The trial court is required to submit to the jury the issues of fact presented by the pleadings and supported by evidence. The failure to do so is prejudicial error. *Nichols v. McArdle* 382

24. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby. *Carter v. Chicago, B. & Q. R. R. Co.* 438

25. The admission of a photograph in evidence, which merely demonstrates the correctness of undisputed oral testimony already before the court, does not ordinarily constitute prejudicial error. *Markey v. Hunter* 472

26. Errors in instructions not prejudicial to the complaining party do not require a reversal of a judgment otherwise correct. *Markey v. Hunter* 472

27. A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown. *Markey v. Hunter* 472

28. Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *State v. Albert* 478

29. Before an error requires a reversal, it must be determined that it was prejudicial to the rights of the party against whom it was made. *State v. Albert* 478

30. The rule that the findings of the Supreme Court on a first appeal become the law of the case on a retrial of the same issues is not available where on the second trial the facts are materially and substantially different. *Bezdek v. Patrick* 522

31. Rule as to law of case decided on prior appeal and effect thereof on further proceedings stated. *Bezdek v. Patrick* 522

32. The determination of the question of whether or not the evidence on a retrial is different from that adduced on an earlier trial is one for the court and not for the jury. *Bezdek v. Patrick* 522

33. When, upon remand, new issues of fact are properly raised which were not present in the former adjudi-

cation and there is sufficient competent evidence adduced to support such new allegations of fact to make them a jury question, the doctrine of the law of the case has no application thereto. *Bezdek v. Patrick* 522

34. An issue not raised by the pleadings and proof in the district court cannot be raised for the first time in the Supreme Court. *Dunbier v. Stanton* 541

35. Except as to questions of jurisdiction, questions not presented to nor passed on by the trial court will not be considered on appeal. *Dunbier v. Stanton* 541
Dunbier v. Rafert 570

36. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. *Dunbier v. Stanton* 541
Bailey v. Karnopp 836

37. Findings of a court in a law action will not be disturbed on appeal unless clearly wrong. *Dunbier v. Stanton* 541

38. Rule for considering sufficiency of evidence in a case where a jury is waived stated. *Dunbier v. Stanton* 541
Bailey v. Karnopp 836

39. Rule for trial of equity case de novo in Supreme Court stated. *Dunbier v. Rafert* 570
State v. Seaton 687
Johnson v. Munsell 749
Bailey v. Karnopp 836
Peters v. Woodmen Accident & Life Co. 861

40. Conditions stated under which an award of compensation by the workmen's compensation court can be set aside by the district court. *Rapp v. Hale* 620

41. Where a retrial has been had before the full compensation court the appeal to the district court is limited in scope and is primarily in the nature of an error proceeding. *Rapp v. Hale* 620

42. On an appeal from the district court to the Supreme Court in a workmen's compensation case, the case shall be considered de novo except where the findings of fact are conclusively supported by the evidence as disclosed by the record. *Rapp v. Hale* 620

43. Where a litigant requests different and antagonistic instructions, he cannot complain of the action of the trial court in giving one of such instructions. *Ripp v. Riesland* 631

44. Instruction on application of comparative negligence

statute was erroneous in imposing a burden of proof on defendant. *Ripp v. Riesland* 631

45. The railway commission is clothed with legislative, administrative, and judicial powers. The Supreme Court has jurisdiction to review the orders and regulations of the commission on appeal. *Neuswanger v. Houk* 670

46. On an appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Neuswanger v. Houk* 670

47. A proceeding the purpose of which is to seek a remission of forfeiture of bail bond is equitable in character and on appeal to the Supreme Court, if an issue of fact is involved, is to be tried de novo and an independent conclusion reached. *State v. Seaton* 687

48. The efficacy of a correct decision by a court is not diminished or destroyed by the assignment or adoption by the court of an erroneous reason for it. *Preferred Pictures Corp. v. Thompson* 694

49. Before an error justifies reversal by the Supreme Court, it must be prejudicial to the rights of the party against whom it was made. *Preferred Pictures Corp. v. Thompson* 694

50. A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed. *Bailey v. Karnopp* 836

51. On the appeal of a law action, it is not within the province of the Supreme Court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, the court in reviewing the judgment rendered will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong. *Bailey v. Karnopp* 836

Attorney and Client.

1. Duty of Supreme Court in proceedings to discipline an attorney stated, and nature of procedure outlined. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483

2. Disbarment proceedings are civil in nature and rules governing civil practice apply, except there is a presumption of innocence and charges must be proved by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
3. A complaint against an attorney should set forth the grounds upon which discipline is sought with reasonable definiteness, so the Supreme Court may be advised of the matters complained of and the attorney fully informed of the matters with which he is charged. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
4. If the charges made against an attorney constitute a crime, the fact that he has neither been charged therewith nor convicted thereof is immaterial in a disciplinary proceeding. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
5. In a disciplinary proceeding only those matters which are specifically charged in the complaint can be considered. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
6. A license to practice law is granted on the implied understanding that the party receiving it will demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
7. An attorney, as an officer of the Supreme Court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the court. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
8. The ethical standards relating to the practice of the law in this state are the Canons of Professional Ethics of the American Bar Association which have been or may be, from time to time, approved by the Supreme Court. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
9. Violation of a code of ethics or any conduct on the part of an attorney in his professional capacity which tends to bring reproach on the legal profession constitutes ground for suspension or disbarment. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483
10. Whether or not the reputation of an attorney is of material importance in any disciplinary case

must necessarily depend largely upon the facts and circumstances thereof. *State ex rel. Nebraska State Bar Assn. v. Fisher* 483

Automobiles.

1. Under Motor Vehicle Guest Act, a guest is a person who accepts a ride in a motor vehicle without giving compensation therefor. *Sunderman v. Wardlaw* 70
   Carter v. Chicago, B. & Q. R. R. Co. 438
2. The question of whether a person riding in a motor vehicle is a guest is generally one of fact to be ascertained from all the facts in the case. *Sunderman v. Wardlaw* 70
3. The phrase "without giving compensation therefor," as contained in Motor Vehicle Guest Act, indicates an intention on the part of the Legislature not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver. *Sunderman v. Wardlaw* 70
4. Rule for determination of whether passenger in motor vehicle is a guest stated. *Sunderman v. Wardlaw* 70
   Carter v. Chicago, B. & Q. R. R. Co. 438
5. A benefit to the owner or operator of a motor vehicle sufficient to remove an occupant riding in it from the provisions of the guest statute must be a tangible and substantial one and a motivating influence for his furnishing the transportation. *Sunderman v. Wardlaw* 70
6. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be considered with all the other facts and circumstances in determining whether or not a party was negligent. *Warren v. Bostock* 203
7. Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the automobile or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident. *Vermaas v. Heckel* 321
8. There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching and

entering a favored highway intersection acted with due care. *Nichols v. McArdle* 382
9. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it. *Nichols v. McArdle* 382
10. Duty of a motorist approaching a highway protected by stop signs stated. *Nichols v. McArdle* 382
11. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. *Nichols v. McArdle* 382
12. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. *Nichols v. McArdle* 382
Ripp v. Riesland 631
13. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. *Nichols v. McArdle* 382
14. A motorist approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and the failure to see such favored automobile is negligence as a matter of law. *Nichols v. McArdle* 382
15. To remove an occupant riding in a motor vehicle from the operation of the guest statute, there must be a substantial benefit accruing to the owner or operator thereof. *Carter v. Chicago, B. & Q. R. R. Co.* 438
16. The status of a person riding in a motor vehicle as being a guest or otherwise is generally one for determination in each individual case under all the facts. *Carter v. Chicago, B. & Q. R. R. Co.* 438
17. A motorist about to enter a highway protected by stop signs must stop, look in both directions, and permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Bezdek v. Patrick* 522
18. Where a motorist approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but errone-

ously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury. *Bezdek v. Patrick* 522

19. A motor vehicle which has entered an intersection or is passing through it at a lawful speed has the right-of-way over a motor vehicle approaching the intersection from a different direction into the path of the first vehicle. *Bezdek v. Patrick* 522

20. Rule that failure by the driver of a motor vehicle to look before crossing an intersection operates to defeat recovery is subject to limitations. It was not intended to constitute such driver an insurer. *Ripp v. Riesland* 631

21. If two vehicles are approaching an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed. *Ripp v. Riesland* 631

22. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances. He is not thereby relieved from the duty of exercising ordinary care to avoid accidents. *Ripp v. Riesland* 631

23. Meaning explained of when motor vehicles approach an intersection at approximately the same time. *Ripp v. Riesland* 631

24. Where a motorist having right-of-way enters a highway and fails to see another motor vehicle, the question of his contributory negligence is for the jury. *Ripp v. Riesland* 631

25. In a negligence action concerning a collision of automobiles at a highway intersection, the jury should be fully and precisely instructed as to the reciprocal rights and duties of the operators of the automobiles. *Ripp v. Riesland* 631

26. A left turn across a public highway between intersections is inherently dangerous. One making such a movement is required to exercise a degree of care commensuate with the danger. *Lockmon v. Reed* 772

27. The giving of the statutory signal for a left turn across a public highway will not absolve a driver from a charge of negligence when he fails to exercise ordinary care for his own safety and that

of others by looking to the front and rear for the approach of other vehicles using the highway. *Lockmon v. Reed* 772

28. Where a driver gives the statutory signal for a left turn across a highway and relies upon the report of others in a position to see that the movement is safe, the question of the driver's negligence is ordinarily one for the jury. *Lockmon v. Reed* 772

Bail.

1. The authority of the district court to remit a part or all of the penalty of a bail bond is a sound discretion to be exercised not arbitrarily or capriciously but with regard to what is right and equitable under the circumstances and the law, directed by reason and conscience to a just result. *State v. Seaton* 687
2. Excessive bail is prohibited by the Constitutions of the United States and of the State of Nebraska. *State v. Seaton* 687
3. A proceeding the purpose of which is to seek a remission of forfeiture of bail bond is equitable in character and on appeal to the Supreme Court, if an issue of fact is involved, is to be tried de novo and an independent conclusion reached. *State v. Seaton* 687

Breach of the Peace.

1. A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace. *State v. Coomes* 298
2. Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof. *State v. Coomes* 298

Bridges.

1. In determining the nature of repairs to be made to bridges, and what bridges should be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of discretion. *Kunz v. Bornemeier* 463

2. The building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. *Kunz v. Bornemeier* 463

Cancellation of Instruments.

1. Elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence stated. *Dunbier v. Rafert* 570
2. In order to set aside a written instrument for want of mental capacity, the burden of proof is upon the party so asserting it to establish that the mind of the person executing such instrument was so weak or unbalanced when the instrument was executed that he could not understand and comprehend the purport and effect of what he was doing. *Dunbier v. Rafert* 570

Carriers.

1. A prima facie case of negligence on the part of a common carrier is made in an action by a passenger against the carrier for personal injury where it appears that some defect in appliances or that some act of the carrier's employees in the conduct of its business contributed to the accident. *Saab v. Omaha & C. B. St. Ry. Co.* 198
2. A prima facie case of negligence is not made in a case of injury to a passenger on leaving a vehicle of transportation where the passenger has been given a reasonable opportunity to select his time to alight and to direct his own progress, and who does alight on the street at his destination and becomes a pedestrian. *Saab v. Omaha & C. B. St. Ry. Co.* 198
3. A private carrier is one that is not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a special contract. Such carrier is liable only for such loss or injury as results from a failure to exercise ordinary care. *Sleezer v. Lang* 239
4. Within the meaning of the Constitution, telephone companies are common carriers. *Block v. Lincoln Tel. & Tel. Co.* 531

Conspiracy.

1. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object or a lawful object by unlawful or oppressive means. *Peters v. Woodman Accident & Life Co.* 861
2. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. *Peters v. Woodman Accident & Life Co.* 861

Constitutional Law.

1. Legislation is invalid that authorizes and sanctions the taking of private property for public use without just compensation or that deprives persons of their property without due process of law. *Summerville v. North Platte Valley Weather Control Dist.* 46
2. The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. *Summerville v. North Platte Valley Weather Control Dist.* 46
3. Where the organization of a district is authorized to be initiated by private individuals, there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. *Summerville v. North Platte Valley Weather Control Dist.* 46
4. The Legislature may not delegate legislative functions to private persons. *Summerville v. North Platte Valley Weather Control Dist.* 46
5. In the absence of an emergency, a legislative act takes effect 3 calendar months after the adjournment of the Legislature. *Summerville v. North Platte Valley Weather Control Dist.* 46
6. Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state. One owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay. *Chicago, B.*

& Q. R. R. Co. v. State Board of Equalization & Assessment 77
Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106
Union P. R. R. Co. v. State Board of Equalization & Assessment 139

7. The transfer of lands from one district to another, initiated by petitions signed by the required number of voters, and granted by the county superintendent after notice and hearing, and from which order a judicial review is available, meets all the requirements of due process. *Lindgren v. School Dist. of Bridgeport* 279
8. In all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation. *State v. Coomes* 298
9. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *State v. Coomes* 298
10. The power of the railway commission to regulate common carriers is derived from the Constitution. Such power is plenary and self-executing in the absence of specific legislation. *Neuswanger v. Houk* 670
11. Where the Legislature enacts specific legislation implementing the Constitution, the railway commission is subject to and governed by the provisions of such enactment. *Neuswanger v. Houk* 670
12. The Legislature may not lawfully delegate legislative powers to an administrative or executive authority. *Lincoln Dairy Co. v. Finigan* 777
13. The exercise of a legislatively-delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law with designated limitations and standards, is not an exercise of legislative power. *Lincoln Dairy Co. v. Finigan* 777
14. The limitations of a legislatively-delegated authority and the standards by which the granted powers are to be administered must be clearly and definitely stated. They may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available. *Lincoln Dairy Co. v. Finigan* 777
15. The Legislature cannot delegate its power to create criminal offenses and prescribe penalties to an ad-

ministrative or executive authority. Such powers are exclusively legislative and may not be delegated to the executive branch of government under the doctrine of the division of powers contained in the state Constitution. *Lincoln Dairy Co. v. Finigan* 777

16. The grant of power by the Legislature to the Director of the Department of Agriculture and Inspection to promulgate rules and regulations in general compliance with a model code, in accordance with his judgment or whim, the violation of which are made crimes subject to punishment, is an unconstitutional delegation of legislative power to an administrative authority. *Lincoln Dairy Co. v. Finigan* 777

17. The public has a right to know the acts which constitute crimes in this state and the punishments provided therefor. To hold otherwise would in effect deprive the people of personal and property rights for which constitutions were devised to protect. *Lincoln Dairy Co. v. Finigan* 777

18. A citizen has the constitutional right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature under the police power to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. *Lincoln Dairy Co. v. Finigan* 777

19. Where it appears that a statute, under the guise of police regulation, does not tend to preserve the public health, safety, and welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an unwarranted interference with or an encroachment upon the property rights of the individual. *Lincoln Dairy Co. v. Finigan* 777

20. The Legislature has the power to prohibit the sale of food products that are dangerous or harmful to public health but it cannot prohibit the sale of a wholesome and nutritious food product that is not a fraud upon the public. *Lincoln Dairy Co. v. Finigan* 777

21. Grade A milk statute was unconstitutional in three respects noted. *Lincoln Dairy Co. v. Finigan* 777

22. Amendments to Blue-Sky Law were not unconstitutional as being discrimination between rights of citizens. *Davis v. Walker* 891

23. A statute which provides for more than compensatory or actual damages to be paid to an individual

is in excess of legislative authority and is unconstitutional. *Abel v. Conover* 926

24. A statute which provides for a penalty to be paid to the injured party is violative of the Constitution. *Abel v. Conover* 926

25. Statute relating to deceit by an attorney, insofar as it provides for the recovery of treble the actual damages sustained by the injured party, is violative of the Constitution, in that it authorizes the recovery of a penalty by a private individual. *Abel v. Conover* 926

Contempt.

An injunction granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished as a contempt by the court. *State ex rel. Beck v. Lush* 376

Continuances.

A motion for the continuance of a cause, regularly reached for trial, is addressed to the sound discretion of the trial court. Unless abuse of such discretion is shown, ruling on the motion will not be disturbed. *Bailey v. Karnopp* 836

Contracts.

1. Parol evidence is not admissible to vary the terms of a written contract of insurance. *Adolf v. Union Nat. Life Ins. Co.* 38

2. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. *Smith v. Game, Forestation & Parks Commission* 593

3. In construing a writing it is the duty of the court to give to words used their ordinary and popularly accepted meaning in the absence of explanation or qualification. *Smith v. Game, Forestation & Parks Commission* 593

4. In the interpretation of a writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention, but not to vary or contradict the plain terms of the instrument. *Smith v. Game, Forestation & Parks Commission* 593

5. In the absence of fraud, mistake, or ambiguity, where negotiations between parties are reduced to writing, the writing is the only competent evidence of the contract. *Preferred Pictures Corp. v. Thompson* 694
6. If a written contract contains a complete obligation without ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included therein. *Preferred Pictures Corp. v. Thompson* 694
7. Inconvenience or hardship cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. *Parsons Constr. Co. v. Metropolitan Utilities Dist.* 709
8. Value of property is always a matter of judgment. A contract based upon inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud. *Peters v. Woodman Accident & Life Co.* 861

Corporations.

1. An officer or director of a corporation occupies a fiduciary relation to the corporation and to stockholders. He is treated by courts of equity as a trustee, and as such is ordinarily personally liable to beneficiaries of a fund for any misapplication of the fund to other beneficiaries not entitled thereto. *Peters v. Woodman Accident & Life Co.* 861
2. Rule for determination of liability of director of corporation stated. *Peters v. Woodman Accident & Life Co.* 861
3. The 1955 amendments to Blue-Sky Law do not expressly purport by their language to make officers and directors of a corporation liable simply because they are officers and directors, but said statutes did not change their preexisting corporate responsibilities and duties in handling the affairs and transacting the business of the corporation. *Davis v. Walker* 891
4. Directors of a corporation may not delegate their corporate responsibilities and duties as directors to others and avoid liability therefor, and since a corporation has no thought or will of its own, its every act is the act of those who are running it. *Davis v. Walker* 891

5. An officer or director of a corporation occupies a fiduciary relation to the corporation and its stockholders. He is treated by courts of equity as a trustee, and every violation by a trustee of a duty required of him by law, whether willful and fraudulent or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust. *Davis v. Walker* 891
6. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of an officer or director of a corporation creates the same liability as actual knowledge and a failure to act thereon. Where fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsibile therefor in their individual capacity. *Davis v. Walker* 891
7. Liability of an officer or director of a corporation for violation of Blue-Sky Law stated. *Davis v. Walker* 891

Costs.

When a public official has been guilty of negligence in fulfilling the duties of office imposed on him by law, he is liable for the costs of an action or proceeding brought to remedy the wrong. *Ludwig v. Board of County Commissioners* 600

Counties.

1. There is no common-law liability upon a county to support poor and indigent persons. Any liability must arise by statute imposing such duty upon the county and prescribing the manner of its discharge. *Mary Lanning Memorial Hospital v. Clay County* 61
2. The extent of the liability of a county must be found in the legislation creating the duty. *Mary Lanning Memorial Hospital v. Clay County* 61
3. The county board of each county is the overseer of the poor and is vested, by statute, with the entire and exclusive superintendence thereof in such county, whether such poor persons be residents or nonresidents. *Mary Lanning Memorial Hospital v. Clay County* 61
4. Whether a person comes within the purview of the pauper statutes, so as to be entitled to the relief therein provided, is a question of fact to be determined by the county board in each particular case. *Mary Lanning Memorial Hospital v. Clay County* 61

5. The powers of a county are limited to those prescribed by statute. A county board can discharge a statutory obligation only by the statutory means provided by the Legislature. *Mary Lanning Memorial Hospital v. Clay County* 61
6. An obligation against a county for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated by the statutes specifically providing the method for doing so. *Mary Lanning Memorial Hospital v. Clay County* 61
7. The power and authority of a county board to make drainage improvements does not of itself confer power and authority to levy and collect assessments to pay the cost of such improvements. *Shanahan v. Johnson* 399
8. Counties and county boards can exercise only such powers as are expressly conferred upon them by statute. Such grant of powers must be strictly construed and any reasonable doubt of the existence of the powers is resolved against them. *Shanahan v. Johnson* 399
9. County boards possess limited jurisdiction. They have no power or authority to locate and construct a drainage improvement under County Drainage Act, and levy assessments to pay the cost thereof, unless all of the jurisdictional steps have theretofore been timely taken. *Shanahan v. Johnson* 399
10. The power delegated to a county board to locate and construct drainage improvements and levy assessments for the cost thereof is to be strictly construed against such board. Every reasonable doubt as to the extent or limitation of such power is resolved against the board and in favor of the taxpayer. *Shanahan v. Johnson* 399
11. A county board in the location and construction of drainage improvements can only act in the mode prescribed by statute. *Shanahan v. Johnson* 399
12. Under the County Drainage Act, a county board cannot physically locate and complete construction of a drainage improvement; pay the contractor in full therefor; thereafter take the statutory steps required; and thereby validly assess the cost of the improvement to abutting landowners. *Shanahan v. Johnson* 399
13. A county board has no statutory power or authority to make a reassessment after the previous

assessment to pay the cost of a drainage improvement has been declared void by the final judgment of a court of competent jurisdiction. *Shanahan v. Johnson* 399

14. In determining the nature of repairs to be made to bridges, and what bridges should be repaired, when there are not sufficient funds for all, the court will not control the discretion of county commissioners, unless there is a clear abuse of discretion. *Kunz v. Bornemeier* 463

15. Redistricting of a county will not be set aside where a reasonable approximation to equality of population has been attained. *Ludwig v. Board of County Commissioners* 600

16. As used in redistricting statute, "population" means the whole number of people or inhabitants, regardless of age, sex, business, or occupation, whether civilian or military in character, who live in a county or in a county commissioner district at the time of its creation by redistricting the county. *Ludwig v. Board of County Commissioners* 600

Courts.

1. A litigant has no vested right in a mode of procedure. An action commenced before an enactment changing the procedure in a court where the action is pending is properly triable under the changed procedure after the enactment becomes effective, unless the procedure is specifically retained by a saving clause. *Lindgren v. School Dist. of Bridgeport* 279

2. A judicial question arises whenever an act of reapportionment is clearly and palpably tainted with an abuse of discretion. *Ludwig v. Board of County Commissioners* 600

3. The efficacy of a correct decision by a court is not diminished or destroyed by the assignment or adoption by the court of an erroneous reason for it. *Preferred Pictures Corp. v. Thompson* 694

4. The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of a decedent, and to make incidental orders with reference thereto necessary to administer the estate. In so doing the court has no jurisdiction to determine the title to real estate, nor adverse claims involving the title to real estate. *Semrad v. Semrad* 911

Criminal Law.

1. In a criminal case, after trial and conviction in the district court by a jury, error proceedings cannot be taken to the Supreme Court by the defendant therein before a judgment has been rendered or a final order made by the court below, which judgment or final order must include a sentence. *Kennedy v. State* 193
2. In order to review alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and a ruling obtained thereon. *Kennedy v. State* 193
3. It is a prerequisite to the right of the Supreme Court to review a trial court's ruling on a defendant's motion to have a bill of exceptions furnished at the expense of the county, that the affidavit of poverty is filed in the district court. *Kennedy v. State* 193
4. In all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation. *State v. Coomes* 298
5. Due process of law requires only that the accused be given sufficient notice of the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *State v. Coomes* 298
6. In this state all public offenses are statutory; no act is criminal unless the Legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law. *State v. Coomes* 298
7. There are no common law crimes in this state. Resort to common law definitions is sometimes necessary where general terms are used to designate crime. *State v. Coomes* 298
8. To predicate error upon misconduct of counsel in addressing the jury, objection must have been properly made at the time or at the conclusion of counsel's statement or argument, and ruling had before submission of the case to the jury. *Haines v. State* 304
9. A prosecutor, in argument to the jury, may state proper conclusions which are predicated upon competent evidence which will be or has been adduced. Unless an error in argument complained of was

prejudicial to the rights of defendant, the judgment should not be reversed. *Haines v. State* 304

10. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Haines v. State* 304

11. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon the evidence, unless it is so lacking in probative force that the court can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt. *Haines v. State* 304

12. The Supreme Court will not in a homicide case resolve conflicts in or weigh evidence or pass upon the credibility of witnesses. *Clown Horse v. State* 336
Wilson v. State 494

13. It is implicit in a verdict of guilty in a homicide case that the jury decided all controverted questions of fact unfavorably to the accused. The Supreme Court will not disturb the verdict if based on evidence unless, as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt. *Clown Horse v. State* 336
Wilson v. State 494

14. In order to obtain a bill of exceptions at the cost of the county, a defendant in a criminal case must file a poverty affidavit within 1 calendar month after rendition of judgment or final order of which complaint is made. *Kennedy v. State* 348

15. Duty of trial court in instructing jury in criminal case is stated. Failure to charge upon some particular phase of the case is not error in the absence of a proper request. *Kucera v. State* 368

16. Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses. *Texter v. State* 426

17. It is the duty of the prosecution to produce all evidence tending to establish the guilt or innocence of an accused. However, it is not necessary for the State to call every witness whom it knows may have some knowledge relating to the crime charged if such knowledge is not material to the question of the accused's guilt or innocence. *Texter v. State* 426

18. In a criminal case, the Supreme Court will not interfere with a verdict of guilty based upon conflicting evidence unless it is so lacking in probative force that it can say, as a matter of law, that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt. *Texter v. State* 426
19. If the corpus delicti is proved, an unsupported, extrajudicial admission may be sufficient to establish connection of the accused with the crime charged. *Wilson v. State* 494
20. A showing of all that occurred immediately before and at the time of the making of a confession is sufficient foundation for its admission if such proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements and threats. *Wilson v. State* 494
21. Requisites necessary to constitute an accomplice in a criminal case stated. *Wilson v. State* 494
22. It is improper and generally prejudicial for a prosecuting attorney in a criminal case to declare to the jury his personal belief of the guilt of a defendant; but if such belief is expressed as a deduction from the evidence, it is not improper. *Wilson v. State* 494
23. It is permissible for the prosecutor to refer to the defendant in a homicide case as a bandit, a robber, and a murderer when such conclusions are reasonable and legitimate deductions drawn from the evidence. *Wilson v. State* 494
24. If no objection is made to alleged improper conduct of opposing counsel in his argument to the jury at the time of the making thereof, there can be no prejudicial error predicated upon the alleged misconduct. *Wilson v. State* 494
25. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed. *Jungclaus v. State* 704
26. A conviction may rest on the uncorroborated testimony of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Jungclaus v. State* 704
27. Where a cautionary instruction on the weight and credibility of the testimony of an accomplice is requested, it is reversible error for the trial court

to refuse to give such an instruction. *Jungclaus v. State* 704

28. In this state all public offenses are statutory, and no person can be punished for any act or omission which is not made penal by the plain import of a properly enacted statute. *Lincoln Dairy Co. v. Finigan* 777

29. The public has a right to know the acts which constitute crimes in this state and the punishments provided therefor. To hold otherwise would in effect deprive the people of personal and property rights for which constitutions were devised to protect. *Lincoln Dairy Co. v. Finigan* 777

Damages.

1. In an action for damages for loss of future earnings it is the duty of the court to instruct the jury that the amount thereof shall be reduced to present worth or value. *Patras v. Waldbaum* 20

2. In the absence of request the court is not required to instruct as to a basis for determination of present worth or value of future damages. *Patras v. Waldbaum* 20

3. If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous. *Patras v. Waldbaum* 20

4. As a general rule, the question of whether a sum mentioned in a contract is to be considered as liquidated damages or as a penalty is a question of law, dependent on the construction of the contract by the court. *Parsons Constr. Co. v. Metropolitan Utilities Dist.* 709

5. If the damages arising from a breach of the contract are not disproportionate to the amount of damages that may be reasonably anticipated from the breach, a provision for payment of a stipulated amount will usually be regarded as liquidated damages. *Parsons Constr. Co. v. Metropolitan Utilities Dist.* 709

6. In this state the measure of recovery in all civil actions is compensation for the injury sustained. *Abel v. Conover* 926

7. A statute which provides for more than compensatory or actual damages to be paid to an indivi-

dual is in excess of legislative authority and is unconstitutional. *Abel v. Conover* 926

8. A statute providing for liquidated damages, though in the form of a penalty, will be upheld if the amount provided bears a reasonable relation to the actual damages which might be sustained, and if the damages are not susceptible of measurement by ordinary pecuniary standards. *Abel v. Conover* 926

Deeds.

From the standpoint of time, the law in effect at the time of the execution of a deed generally governs its validity and interpretation. *Dell v. City of Lincoln* 176

Descent and Distribution.

The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of a decedent, and to make incidental orders with reference thereto necessary to administer the estate. In so doing the court has no jurisdiction to determine the title to real estate, nor adverse claims involving the title to real estate. *Semrad v. Semrad* 911

Drains.

1. The power and authority of a county board to make drainage improvements does not of itself confer power and authority to levy and collect assessments to pay the cost of such improvements. *Shanahan v. Johnson* 399
2. County boards possess limited jurisdiction. They have no power or authority to locate and construct a drainage improvement under County Drainage Act, and levy assessments to pay the cost thereof, unless all of the jurisdictional steps have theretofore been timely taken. *Shanahan v. Johnson* 399
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6. A county board has no statutory power or authority to make a reassessment after the previous assessment to pay the cost of a drainage improvement has been declared void by the final judgment of a court of competent jurisdiction. *Shanahan v. Johnson* 399

Election of Remedies.

Where an action under a statute is a cumulative or alternate remedy to one available at common law, an election of remedies is involved. In such a case a party may not plead a cause of action under the statute and, failing that, rely upon the common law remedy. *Abel v. Conover* 926

Embezzlement.

1. The statute relating to embezzlement by public officers was enacted to prevent any public official from converting any public money received by him in his official capacity to his own use or from using it for any purpose other than the one for which the money was entrusted to him. Fraudulent intent is not an element of the offense. *Haines v. State* 304
2. A report and payment of fines collected by a justice of the peace, which is not made by him until after a shortage and conversion thereof to his own use has been discovered and exposed, is not a defense to a prosecution for embezzlement by a public officer. *Haines v. State* 304

Equity.

Principles governing investigation of fraud by a court of equity stated. *Peters v. Woodman Accident & Life Co.* 861

Escheat.

1. An escheat upon a failure of heirs, under statute, vests the title to the escheated lands in the state on the death of the owner. Action by the state for

a judicial determination that such an escheat has vested is not required. *Semrad v. Semrad* 911
2. The words "failure of heirs," contained in statute, mean an absence of heirs competent to take by descent or devise. *Semrad v. Semrad* 911

Estates.

1. Definition of an estate in fee simple determinable is given and requisites for expiration of the estate stated. *Dell v. City of Lincoln* 176
2. A devise which conveys property in fee simple, to which are attached conditions for the violation of which a forfeiture may be declared by contingent devisees, creates an estate in fee simple subject to conditions subsequent. *Erskine v. Board of Regents* 660
3. Estates upon condition subsequent, which, after having become fully vested may be defeated by a breach of condition, are not favored in law. *Erskine v. Board of Regents* 660
4. Conditions subsequent contained in a devise of real estate will be construed most strongly against contingent devisees and a forfeiture will not be enforced unless clearly established. *Erskine v. Board of Regents* 660
5. To constitute a breach of condition subsequent to a devise relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. *Erskine v. Board of Regents* 660
6. It is not enough to show that the letter of a condition subsequent is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the devisee. *Erskine v. Board of Regents* 660

Estoppel.

1. A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
Ainsworth Irr. Dist. v. Bejot 257
2. The refusal of a school district board to admit a nonresident pupil to its high school under the discretionary provision of the free high school education act does not operate as an estoppel upon the

members of the board to appeal from a decree holding that the proceedings transferring lands belonging to the pupil's parents into such district are void. *Lindgren v. School Dist. of Bridgeport* 279

Evidence.

1. Parol evidence is not admissible to vary the terms of a written contract of insurance. *Adolf v. Union Nat. Life Ins. Co.* 38
2. Impeaching evidence is that which is directed to the question of the credibility of the witness. *Sleezer v. Lang* 239
3. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may, together with sufficient corroborative circumstances, establish the corpus delicti as well as the defendant's guilty participation. *Haines v. State* 304
4. Admissions in the law of evidence are concessions or voluntary acknowledgments made by a party of the existence of certain facts, and they are ordinarily classified as judicial and extrajudicial. *Vermaas v. Heckel* 321
5. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. *Vermaas v. Heckel* 321
6. A judicial admission is ordinarily final and conclusive upon the party by whom it was made, unless the trial court, in the exercise of a judicial discretion, timely relieves him from that consequence. *Vermaas v. Heckel* 321
7. An extrajudicial admission is simply an item of evidence in the mass of proof adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission. *Vermaas v. Heckel* 321
8. An extrajudicial admission is not ordinarily final and conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel. *Vermaas v. Heckel* 321
9. A change in testimony by a litigant to meet the exigencies of the case is discredited as a matter of law and should be disregarded. *Nichols v. McArdle* 382

10. Rule as to the effect of contradictory statements of a witness made out of court stated. *Texter v. State* 426
11. A photograph is properly admissible as evidence if it be shown that it is a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry. *Markey v. Hunter* 472
12. The admission of a photograph in evidence, which merely demonstrates the correctness of undisputed oral testimony already before the court, does not ordinarily constitute prejudicial error. *Markey v. Hunter* 472
13. If the corpus delicti is proved, an unsupported, extrajudicial admission may be sufficient to establish connection of the accused with the crime charged. *Wilson v. State* 494
14. Proof of contradictory statements by a witness does not dispose of his testimony but is to be considered with the other evidence in the case in the determination thereof. *Wilson v. State* 494
15. Proof of contradictory statements of a witness is received not as evidence of the facts declared, unless made against interest by one who is a party to the record, but for the purpose only of aiding the jury in estimating the credibility of the witness. *Wilson v. State* 494
16. A showing of all that occurred immediately before and at the time of the making of a confession is sufficient foundation for its admission if such proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements and threats. *Wilson v. State* 494
17. Where a litigant is actually taken by surprise, he may show that witness has made a prior statement inconsistent with and contradictory of his testimony. *Wilson v. State* 494
18. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be placed before the jury. *Wilson v. State* 494
19. Under ordinary circumstances expert opinion evidence is to be considered and weighed by the triers of fact like any other testimony. *Dunbier v. Stanton* 541
20. When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances. *Dunbier v. Stanton* 541

21. The mere opinion of witnesses who testify alone from familiarity with a signature and from comparing genuine and disputed writing has less weight generally on the issue of forgery than expert opinions based on scientific skill and sound reasons. *Dunbier v. Stanton* 541
Dunbier v. Rafert 570
22. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evidence is equally competent with direct testimony. *Dunbier v. Stanton* 541
23. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. *Dunbier v. Stanton* 541
24. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. *Dunbier v. Stanton* 541
25. Rule stated as to sufficiency of evidence necessary to establish an oral contract to devise or bequeath an estate. *Dunbier v. Stanton* 541
26. Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. *Dunbier v. Stanton* 541
27. In an action to establish an oral contract to devise or bequeath an estate, each case is to be determined from the facts, circumstances, and conditions as presented therein. *Dunbier v. Stanton* 541
28. Testimony of handwriting experts that a written contract offered in evidence is a forgery, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony that signatures to the contract were genuine. *Dunbier v. Rafert* 570
29. The result of comparisons made by handwriting experts is a character of evidence sanctioned by statute and merits proper consideration on the issue of forgery in a civil action. *Dunbier v. Rafert* 570
30. Courts will take judicial notice of the results of

a United States census, of a school census, and of an authorized election and the votes cast thereat. *Ludwig v. Board of County Commissioners* 600

31. Courts will take judicial notice of the population of a county created by the state. *Ludwig v. Board of County Commissioners* 600

32. Where evidence of a witness' prior evaluation of certain property, inconsistent with his present estimate, is introduced, the witness may explain the circumstances of his former evaluation and state why he now testifies differently. *Peters v. Woodman Accident & Life Co.* 861

Executors and Administrators.

1. Objections to claim filed in the county court against the estate of a deceased person will be construed with great liberality in the district court. *Dunbier v. Stanton* 541

2. The term "administrator de bonis non" means an administrator who has been appointed in the place of a former administrator or executor who has ceased to be such after partial administration of the estate. *Johnson v. Munsell* 749

3. An administrator de bonis non has all the powers of his predecessor and is authorized to and should prosecute an action if he in good faith believes it necessary for the recovery of a debt owing the estate. *Johnson v. Munsell* 749

Fines.

Where a statute imposes liability for actual damages and also imposes additional liability for the same act, such additional liability is a fine or a penalty. *Abel v. Conover* 926

Forgery.

Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. *Fidelity & Deposit Co. v. Bodenstedt* 799

Fraud.

1. A defense on the ground of fraud may be shown by parol, not to contradict or vary but to destroy the legal and binding effect of a written instrument. *Nathan v. McKernan* 1

2. The asking of a certain price for an item of property is not a representation of its value. *Nathan v. McKernan* 1
3. A representation to be fraudulent must be made either with knowledge of its falsity or without such knowledge as a positive statement of a known fact. *Nathan v. McKernan* 1
4. Fraud must relate to a present or preexisting fact and may not be generally predicated on a representation concerning an event in the future or acts to be done in the future. *Nathan v. McKernan* 1
5. Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry. *Nathan v. McKernan* 1
6. A defrauded party must be diligent and prudent in his effort to detect the fraud. Means of knowledge thereof is equivalent to knowledge. *Nathan v. McKernan* 1
7. A right of action for fraud may be waived. While the defrauded party may retain what he received, stand to his bargain, and recover for the loss occasioned by the fraud, he cannot do so where, having full knowledge, he does an act or acts indicating his intention to waive the fraud. *Nathan v. McKernan* 1
8. Fraud or misrepresentation is generally a question of fact and to be sufficient as a cause of action or a defense must be pleaded by suitable allegations of fact from which it may be concluded. *Preferred Pictures Corp. v. Thompson* 694
9. A general charge of fraud or misrepresentation is a conclusion and presents no issue of fact. *Preferred Pictures Corp. v. Thompson* 694
10. Value of property is always a matter of judgment. A contract based upon inadequate consideration will not be set aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud. *Peters v. Woodman Accident & Life Co.* 861
11. Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him. *Peters v. Woodman Accident & Life Co.* 861
12. Principles governing investigation of fraud by a court of equity stated. *Peters v. Woodman Accident & Life Co.* 861
13. To prove fraud direct evidence is not always essen-

tial. Inferences or presumptions of fraud may be drawn from facts and circumstances. However, such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred. *Peters v. Woodman Accident & Life Co.* 861

14. What constitutes fraud is a matter of fact in each case. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient. *Peters v. Woodman Accident & Life Co.* 861

15. Effect of existence of confidential or fiduciary relation in action for fraud stated. *Peters v. Woodman Accident & Life Co.* 861

Frauds, Statute of.

1. Rule stated as to sufficiency of evidence necessary to establish an oral contract to devise or bequeath an estate. *Dunbier v. Stanton* 541

2. Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. *Dunbier v. Stanton* 541

3. In an action to establish an oral contract to devise or bequeath an estate, each case is to be determined from the facts, circumstances, and conditions as presented therein. *Dunbier v. Stanton* 541

Gifts.

1. This jurisdiction recognizes the right of an owner of real or personal property to make a gift of it inter vivos without consideration. *Dunbier v. Rafert* 570

2. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee. *Dunbier v. Rafert* 570

Highways.

1. There is, in the absence of evidence to the contrary, a presumption that a motorist in approaching and entering a favored highway intersection acted with due care. *Nichols v. McArdle* 382

2. A motorist traveling on a favored highway protected by a stop sign of which he has knowledge may properly assume that oncoming traffic will obey it. *Nichols v. McArdle* 382
3. A motorist on a highway may assume that other users thereof will use them in a lawful manner and govern his acts in accordance with such assumption unless or until he has warning, notice, or knowledge to the contrary. *Nichols v. McArdle* 382
4. Duty of a motorist approaching a highway protected by stop signs stated. *Nichols v. McArdle* 382
5. The duty of a motorist to look for vehicles approaching on a highway protected by stop signs implies the obligation to see what is in plain view. *Nichols v. McArdle* 382
6. A motorist entering an intersection of highways is obligated to look for approaching automobiles and to see any vehicle within that radius which denotes the limit of danger. *Nichols v. McArdle* 382
Ripp v. Riesland 631
7. If a motorist entering an intersection looks for approaching vehicles but fails to see one which is favored over him under the rules of the road, he is guilty of negligence as a matter of law. *Nichols v. McArdle* 382
8. A motorist approaching or entering an intersection is required to see another automobile approaching or entering the intersection which has been favored with the right-of-way under the statutory rules of the road and the failure to see such favored automobile is negligence as a matter of law. *Nichols v. McArdle* 382
9. A public highway may be established by prescription on continuous adverse use thereof by the public for a period of 10 years. *Kunz v. Bornemeier* 463
10. In determining the question of whether or not a public highway has been established by dedication, a court is required to examine the proceedings had to ascertain if the jurisdictional requirements necessary for that purpose have been met. *Kunz v. Bornemeier* 463
11. If the jurisdictional requirements for the establishment of a public highway by dedication have not been met, the lapse of time will not supply the defect. *Kunz v. Bornemeier* 463
12. A motorist about to enter a highway protected by stop signs must stop, look in both directions, and

permit all vehicles to pass which are at such a distance and traveling at such a speed that it would be obviously dangerous for him to proceed across the intersection. *Bezdek v. Patrick* 522

13. Where a motorist approaching a through street or highway stops, looks, and sees an approaching vehicle on the favored street or highway but erroneously judges its speed or distance or for some other reason assumes he can proceed with safety and not have a collision, the question of whether or not his conduct in doing so makes him guilty of contributory negligence is usually one for the jury. *Bezdek v. Patrick* 522

14. A motor vehicle which has entered an intersection or is passing through it at a lawful speed has the right-of-way over a motor vehicle approaching the intersection from a different direction into the path of the first vehicle. *Bezdek v. Patrick* 522

15. All travelers are required to exercise due care in coming to and crossing an intersection of public highways. *Ripp v. Riesland* 631

16. Rule that failure by the driver of a motor vehicle to look before crossing an intersection operates to defeat recovery is subject to limitations. It was not intended to constitute such driver an insurer. *Ripp v. Riesland* 631

17. If two vehicles are approaching an intersection at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right if it is traveling at a lawful rate of speed. *Ripp v. Riesland* 631

18. One having the right-of-way may not on that account proceed with disregard of the surrounding circumstances. He is not thereby relieved from the duty of exercising ordinary care to avoid accidents. *Ripp v. Riesland* 631

19. Meaning explained of when motor vehicles approach an intersection at approximately the same time. *Ripp v. Riesland* 631

20. Where a motorist having right-of-way enters a highway and fails to see another motor vehicle, the question of his contributory negligence is for the jury. *Ripp v. Riesland* 631

21. A left turn across a public highway between intersections is inherently dangerous. One making such a movement is required to exercise a degree

of care commensurate with the danger. *Lockmon v. Reed* 772

22. The giving of the statutory signal for a left turn across a public highway will not absolve a driver from a charge of negligence when he fails to exercise ordinary care for his own safety and that of others by looking to the front and rear for the approach of other vehicles using the highway. *Lockmon v. Reed* 772

23. Where a driver gives the statutory signal for a left turn across a highway and relies upon the report of others in a position to see that the movement is safe, the question of the driver's negligence is ordinarily one for the jury. *Lockmon v. Reed* 772

Homicide.

1. A purpose to kill and malice are essential elements of murder in the second degree and in a prosecution therefor each must be established beyond a reasonable doubt. *Clown Horse v. State* 336

2. In a homicide case the unlawful killing is the principal fact but the condition of the mind of the accused or the attendant circumstances determine the class of the crime as second-degree murder or manslaughter. *Clown Horse v. State* 336

3. If the evidence in reference thereto is such that various inferences may properly be deduced therefrom as to the degree of the crime, the trial court must submit the different degrees to the jury to determine which inference shall prevail. *Clown Horse v. State* 336

4. It is the duty of the district court to instruct the jury on such degree or degrees of homicide as are supported by evidence sufficient to sustain a verdict of guilty. *Clown Horse v. State* 336

5. Where all the circumstances surrounding a homicide are not shown, the law presumes legal malice. Where all the circumstances are shown by the evidence, there is no presumption of malice, but the issue is one of fact for the jury from all the evidence. *Clown Horse v. State* 336

6. Homicide in the perpetration or attempt to perpetrate a robbery is a separate offense distinguished from ordinary first-degree murder and in a prosecution for such an offense proof is not required of premeditation, deliberation, or a purpose to kill. *Wilson v. State* 494

7. The turpitude involved in a robbery takes the place of deliberate, premeditated malice and the purpose to kill is conclusively presumed from the criminal intention required for robbery. *Wilson v. State* 494
8. In a homicide case, the verdict of the jury should not be influenced by or rest upon the fact of whether a parole, pardon, or other clemency is easy or difficult to secure. *Wilson v. State* 494

Improvements.

1. As a general rule, improvements of a permanent character made on real estate and attached thereto without the consent of the owner of the fee, by one having no title or interest, become a part of the realty and vest in the owner of the fee as his own property. *Blomquist v. Board of Educational Lands & Funds* 741
2. The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise. *Blomquist v. Board of Educational Lands & Funds* 741
3. Trees growing on land, in the absence of agreement or statute indicating otherwise, are a part of the land. *Blomquist v. Board of Educational Lands & Funds* 741

Indictments and Informations.

1. An information must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense. *State v. Coomes* 298
2. Where a statute states the elements of a crime, it is generally sufficient in an information to describe such crime in the language of the statute. *Haines v. State* 304
Jungclaus v. State 704
3. If the information apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes

of an information as well as constitutional requirements. *Haines v. State* 304
4. The charging of a crime in the language of the statute may be insufficient to inform the defendant of the nature of the crime charged. In such event additional averments are required. *Jungclaus v. State* 704
5. Where an information adequately informs the defendant as to the specific crime with which he is charged, it is not error for the trial court to deny a request for a bill of particulars. *Jungclaus v. State* 704

Injunctions.

1. An injunction suit to enjoin the enforcement of an order annexing territory to a school district is a collateral attack upon it and is not available unless the order is wholly void and not merely erroneous. *Lindgren v. School Dist. of Bridgeport* 279
2. An injunction granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished as a contempt by the court. *State ex rel. Beck v. Lush* 376
3. A party who has knowledge of an injunction and is in privity with a party enjoined is bound thereby. *State ex rel. Beck v. Lush* 376
4. A void assessment may be enjoined. Knowledge of the proceedings will not estop landowner from contesting void assessment. *Shanahan v. Johnson* 399

Insane Persons.

1. There is no common-law liability of a parent for support of an insane relative, and the statutory procedure for determining and fixing such a liability must be strictly followed. *County of Keith v. Creamer* 362
2. Under statute prescribing a procedure for imposing liability on a parent for the care and maintenance of an insane child in a state hospital, investigation and determination by the county board to determine ability of a parent to pay without depriving dependents of necessary support is a condition precedent to the attaching of liability. *County of Keith v. Creamer* 362
3. Where conditions precedent contained in statute have not been complied with during the lifetime of a relative sought to be charged, no absolute liability

attaches to the relative nor to his estate. *County of Keith v. Creamer* 362

Insurance.

1. Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency. *Adolf v. Union Nat. Life Ins. Co.* 38
2. A contract of insurance which is plain and unambiguous as to its meaning must be enforced according to its terms the same as any other contract. *Adolf v. Union Nat. Life Ins. Co.* 38
3. When an application or conditional receipt provides that insurance shall be effective as of the date of the application or conditional receipt, subject to the approval of the application or its acceptance by the insurer, no protection is afforded the applicant until the application is approved or accepted. *Adolf v. Union Nat. Life Ins. Co.* 38
4. While an applicant is entitled to have indefinite and ambiguous provisions of an insurance contract construed in his favor, plain and unambiguous provisions cannot be disregarded because they were not read or understood by the applicant. *Adolf v. Union Nat. Life Ins. Co.* 38
5. A provision in a contract of insurance that the insurer will not be bound by statements or promises made by an agent unless the same are reduced to writing, submitted to the company at its home office, and made a part of the contract, is a limitation upon the authority of the agent, and agreements made by the agent not in compliance therewith have no binding effect on the insurer. *Adolf v. Union Nat. Life Ins. Co.* 38

Judgments.

1. A case must be determined on the law as it stands when judgment is rendered therein. *Summerville v. North Platte Valley Weather Control Dist.* 46
2. The purpose of the Uniform Declaratory Judgments Act is to provide a procedure for the speedy determination of issues which would otherwise be delayed to the possible injury of the parties if the ordinary course of judicial proceedings is followed. It creates no new causes of action and provides no

cumulative remedies, although the act is remedial in character. *Scudder v. County of Buffalo* 293
3. Ordinarily an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law. *Scudder v. County of Buffalo* 293
4. A judgment or decree rendered by consent of the parties is valid if requirements establishing its validity have been met. *State ex rel. Beck v. Lush* 376
5. A consent decree is as much a final decree and as conclusive upon the parties as is one which has been rendered after a hearing on the merits. *State ex rel. Beck v. Lush* 376
6. Material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action. *Bezdek v. Patrick* 522
7. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Fidelity & Deposit Co. v. Bodenstedt* 799
8. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Fidelity & Deposit Co. v. Bodenstedt* 799
9. A court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. *Fidelity & Deposit Co. v. Bodenstedt* 799

Judicial Sales.

1. A successful bidder at a judicial sale becomes a party to the proceedings, may appear and urge confirmation, and may appeal from an order setting the sale aside. *Michelson v. Wagner* 28
2. Every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court. *Michelson v. Wagner* 28
3. In partition proceedings it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of

those persons lawfully entitled to the proceeds of the sale. *Michelson v. Wagner* 28

4. Confirmation of judicial sales rests largely within the discretion of the trial court. Rule for review of exercise of discretion stated. *Michelson v. Wagner* 28

5. Substantially increased offers to a referee for property sold by him, made before confirmation of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered. *Michelson v. Wagner* 28

6. An upset bid, made after the judicial sale has been held and prior to its confirmation by the court, is relevant only to the extent that it bears upon the fairness of the sale and the adequacy of the highest bid at the advertised judicial sale. *Michelson v. Wagner* 28

Juries.

It is not the province of the Supreme Court in law actions to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the jury. *Haines v. State* 304

Justices of the Peace.

A report and payment of fines collected by a justice of the peace, which is not made by him until after a shortage and conversion thereof to his own use has been discovered and exposed, is not a defense to a prosecution for embezzlement by a public officer. *Haines v. State* 304

Landlord and Tenant.

The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise. *Blomquist v. Board of Educational Lands & Funds* 741

Licenses.

1. Prior to enactment of 1955 amendments to Blue-Sky Law, there was no specific remedy for recovery of money paid out for the purchase of securities and interests issued, sold, exchanged, or transferred

in violation of the Blue-Sky Law. No recovery could be had under said sections for the value of consideration paid for securities and interests purchased prior to the date said amendments became effective. *Davis v. Walker* 891

2. The 1955 amendments to Blue-Sky Law created a specific remedy which did not exist at common law. As a general rule statutes will not be understood as effecting any change in the common law beyond what is clearly indicated. Statutes in conflict with the common law must be strictly interpreted. *Davis v. Walker* 891

3. The 1955 amendments to Blue-Sky Law do not expressly purport by their language to make officers and directors of a corporation liable simply because they are officers and directors, but said statutes did not change their preexisting corporate responsibilities and duties in handling the affairs and transacting the business of the corporation. *Davis v. Walker* 891

4. Liability of an officer or director of a corporation for violation of Blue-Sky Law stated. *Davis v. Walker* 891

Limitations of Actions.

1. The defense of recoupment must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations. *Nathan v. MeKernan* 1

2. The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action. *Muenchau v. Swarts* 209

Mandamus.

The building of bridges, or the making of local improvements, is a discretionary power entrusted to public and municipal corporations, and, when the proper authorities have in good faith decided, mandamus will not issue to compel them to a different course. *Kunz v. Bornemeier* 463

Master and Servant.

1. The fact that an employee is the general servant of one employer does not, as a matter of law, pre-

vent him from becoming the particular servant of another, who may become liable for his acts. *Vontress v. Ready Mixed Concrete Co.* 789

2. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another person. *Vontress v. Ready Mixed Concrete Co.* 789

Mechanics' Liens.

1. Mechanic's lien statutes are cumulative and remedial in nature requiring a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope. *Muenchau v. Swarts* 209

2. A subcontractor's lien is given not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building. *Muenchau v. Swarts* 209

3. A subcontractor must file a sworn statement of the amount due him from the contractor within 60 days from the date of the last material furnished to or labor performed for the contractor in order to perfect a mechanic's lien. *Muenchau v. Swarts* 209

Motor Carriers.

1. An application to the railway commission for the transfer of valid intrastate operating rights from one common carrier to another is properly instituted under the statutory provision for transfer of such rights. *Burlington Truck Lines, Inc. v. Brown Transfer* 331

2. An order of the railway commission granting an application to a trucking company to operate over alternate routes for convenience only does not authorize the carriage of freight other than that which can be transported on the regular route authority. *Burlington Truck Lines, Inc. v. Brown Transfer* 331

3. The railway commission may revoke, change, or suspend a certificate of public convenience and necessity for willful failure to comply with statute

or lawful rules and regulations of the commission. *Neuswanger v. Houk* 670

4. The term "willful failure," as used in the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. *Neuswanger v. Houk* 670
5. Where an application is made for the transfer of operating rights under Motor Carrier Act, the question of whether or not such operating rights are dormant relates to the time the application is made, a hearing is held thereon, and for a reasonable length of time immediately prior thereto. *Neuswanger v. Houk* 670
6. Where a certificate of public convenience and necessity is not dormant, it may be transferred on approval of the railway commission under reasonable rules and regulations to be prescribed by it, if statutory requirements are met. *Neuswanger v. Houk* 670
7. Controlling questions stated in determining issue of public convenience and necessity in cases where new or extended operating rights are sought. *Neuswanger v. Houk* 670

Municipal Corporations.

1. The formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries are legislative functions. *Summerville v. North Platte Valley Weather Control Dist.* 46
2. Upon annexation of the village of Havelock by the city of Lincoln, the latter succeeded to the rights, liabilities, and duties imposed upon the former, whether accrued or thereafter to accrue. *Dell v. City of Lincoln* 176
3. The acknowledgment and recording of a plat laying out land into lots and blocks and showing thereon the streets and alleys, under statute, operates as a dedication which is equivalent to a deed in fee simple to such portions of the premises platted as is on such plat set apart for streets and alleys for public use to the municipality. *Dell v. City of Lincoln* 176
4. Under statute, whenever any avenue, street, alley, or lane is vacated the same shall revert to the

owners of adjacent real estate, one-half on each side thereof. *Dell v. City of Lincoln* 176

5. Statutory provisions for filing of plat and for vacation of streets and alleys are in pari materia. *Dell v. City of Lincoln* 176

6. While the equivalent to a deed in fee simple to the streets and alleys on a plat is vested in a municipality under specified statutory provisions, such fee is a qualified, base, or determinable fee which may be continued forever if the streets and alleys be devoted to the public use. Such fee is determined by the vacation of streets and alleys by the municipality. *Dell v. City of Lincoln* 176

7. The title to a street vested in a city of the primary class or in a city of the second class or village is not generally a fee simple absolute but is a qualified base or determinable fee and it is held in trust for the purposes to which the street is dedicated. *Dell v. City of Lincoln* 176

8. That vacation proceedings are had by a village board or a city council at the instance and request, and primarily for the benefit, of certain owners whose property would be benefited by such vacation, is not ground for declaring the vacation ordinance void. *Dell v. City of Lincoln* 176

9. The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of such street is a property right in the nature of an easement in the street of which he cannot be deprived without due process of law and compensation for his loss. *Dell v. City of Lincoln* 176

10. Definition and general powers of municipal corporation stated. *Dell v. City of Lincoln* 176

11. Under the provisions of the Constitution of this state, a home rule charter must be consistent with and subject to the Constitution and laws of this state. *Dell v. City of Lincoln* 176

12. Under a home rule charter, a city may provide for the exercise of every power, not contravening constitutional inhibitions, connected with the proper and efficient government of the municipality. *Dell v. City of Lincoln* 176

13. Where the Legislature has enacted a law affecting municipal affairs, but which is of state-wide concern, such law takes precedence over any action

taken by a home rule city under its charter. *Dell v. City of Lincoln* 176

14. The preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are attributes of state sovereignty and matters of state-wide concern. When the Legislature enacts a general law upon any of these subjects with respect to cities of a particular class, such law applies to all cities of the class, including home rule cities. *Dell v. City of Lincoln* 176
15. Cities which have adopted a home rule charter, as authorized by the Constitution, are subject to the general laws of the state, except as to municipal matters of strictly local concern. *Dell v. City of Lincoln* 176
16. Whether or not an act of the Legislature pertains to a matter of state-wide or strictly local concern becomes a question for the courts when a conflict of authority arises. *Dell v. City of Lincoln* 176

Names.

In the absence of statutory prohibition, a person may adopt or assume a name wholly or partly different by which he may transact business. *Fidelity & Deposit Co. v. Bodenstedt* 799

Negligence.

1. In an action for negligence the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it. *Saab v. Omaha & C. B. St. Ry. Co.* 198
2. A prima facie case of negligence on the part of a common carrier is made in an action by a passenger against the carrier for personal injury where it appears that some defect in appliances or that some act of the carrier's employees in the conduct of its business contributed to the accident. *Saab v. Omaha & C. B. St. Ry. Co.* 198
3. A prima facie case of negligence is not made in a case of injury to a passenger on leaving a vehicle of transportation where the passenger has been given a reasonable opportunity to select his time to alight and to direct his own progress, and who does alight on the street at his destination and

becomes a pedestrian. *Saab v. Omaha & C. B. St. Ry. Co.* 198

4. A violation of statutes regulating the use and operation of motor vehicles upon the highways is not negligence per se, but evidence of negligence which may be considered with all the other facts and circumstances in determining whether or not a party was negligent. *Warren v. Bostock* 203
5. Actionable negligence exists when the injury is the proximate result thereof, and the proximate result must be the natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of the attendant circumstances. *Warren v. Bostock* 203
6. Proximate cause, as used in the law of negligence, is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Warren v. Bostock* 203
7. When the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury, the determination of the proximate cause is for the jury. *Warren v. Bostock* 203
8. Violation of federal statute or regulation with reference to operation of airplanes is not negligence per se but is evidence of negligence. *Sleezer v. Lang* 239
9. Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory negligence, and the degree thereof when one is compared with the other, such issues must be submitted to the jury. *Vermaas v. Heckel* 321
10. Negligence, which is the moving or effective cause of a happening, is the proximate cause thereof. *Nichols v. McArdle* 382
11. A violation of a city ordinance regulating the speed of railroad trains is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *Carter v. Chicago, B. & Q. R. R. Co.* 438
12. Instruction upon effect of speed of railroad train approaching a crossing did not constitute prejudicial error. *Carter v. Chicago, B. & Q. R. R. Co.* 438

13. Where contributory negligence is pleaded as a defense, but there is no competent evidence to support such defense, it is prejudicial error to submit that issue to the jury. *Carter v. Chicago, B. & Q. R. R. Co.* 438
14. Where contributory negligence of a plaintiff is taken from the jury by an instruction, it is prejudicial error to give other instructions imposing a duty upon such plaintiff to exercise due precautions and to look where he could see and listen where he could hear an approaching train. *Carter v. Chicago, B. & Q. R. R. Co.* 438
15. Doctrine of last clear chance stated. *Bezdek v. Patrick* 522
16. A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a situation involves questions of comparative negligence and not those of the last clear chance doctrine. *Bezdek v. Patrick* 522
17. A violation of a safety regulation is not generally negligence as a matter of law but is a fact which may be considered with all other evidence in a case in deciding an issue of negligence. *Ripp v. Riesland* 631
18. The doctrine of sudden emergency in a negligence case stated. *Ripp v. Riesland* 631
19. Duty of jury in applying comparative negligence statute stated. *Ripp v. Riesland* 631
20. Instruction on application of comparative negligence statute was erroneous in imposing a burden of proof on defendant. *Ripp v. Riesland* 631
21. Duty of making comparison under the comparative negligence statute is placed on the jury. There is no burden of proof on either litigant. *Ripp v. Riesland* 631
22. Where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity, he is charged with the duty of taking suitable precautions to avoid injury or damage to such persons or property. His failure to take such precautions is negligence. *Rose v. Buffalo Air Service* 806
23. Liability of manufacturer of chattel likely to cause bodily harm or danger to property of another stated. *Rose v. Buffalo Air Service* 806

24. In order that the manufacturer of a chattel shall be subject to liability, it is not necessary that the chattel shall be one the use of which is intended to affect, preserve, or destroy human life. The purpose which the article, if perfect, is intended to accomplish is immaterial. The important thing is the harm which it is likely to do to persons or property if it is imperfect. *Rose v. Buffalo Air Service* 806

25. All persons who deal with deadly poisons or dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury from their use. *Rose v. Buffalo Air Service* 806

26. The manufacturer of dangerous substances is not an insurer. If he knows or in the exercise of reasonable care should know that if his product is used as directed or recommended it will cause or be likely to cause material injury, then he is liable to any person who in reliance upon his representations and directions uses the product for the purpose and in the manner directed and recommended and who suffers injury as a direct result. *Rose v. Buffalo Air Service* 806

27. The liability of a manufacturer rests upon the sound rule that a manufacturer or seller of an article inherently dangerous to life or property is liable for injury to the ultimate consumer who has purchased through a middleman. *Rose v. Buffalo Air Service* 806

28. Proof of actual knowledge that the product will be used by another than the purchaser is not required where the article is so made as to be inherently harmful. The manufacturer who puts the component parts together must be presumed to know the nature and quality of the resultant component which he solicits the public to purchase. *Rose v. Buffalo Air Service* 806

29. A cause of injury may be the proximate cause thereof though it pass through a series of events if they are combined in a continuous chain through which the force or presence of the cause operated to produce the disaster. *Rose v. Buffalo Air Service* 806

30. The person on whom a duty of due care devolves is not excused from taking necessary precautions by contracting with or relying on others to take neces-

sary precautionary measures. *Rose v. Buffalo Air Service* 806

New Trial.

1. A district court has the same power to hear and determine a petition for a new trial on the ground of newly discovered evidence after an appeal to the Supreme Court as it would have if no appeal had been taken. *Finnern v. Bruner* 170
2. A petition for a new trial based on newly discovered evidence must show that the grounds alleged could not have been discovered, in the exercise of due diligence, prior to the trial of the case. *Finnern v. Bruner* 170
3. The alleged newly discovered evidence must relate to the issues joined in the original case. It must be material, competent, and credible, and not merely cumulative. *Finnern v. Bruner* 170
4. Newly discovered evidence must be of such a substantial nature as to make it appear that if such evidence had been received in the original trial the judgment would probably have been substantially different. *Finnern v. Bruner* 170
5. Whether or not a party seeking a new trial on the ground of newly discovered evidence exercised due diligence to procure the evidence at the trial must be determined from the facts of each case in which the issue is raised. *Finnern v. Bruner* 170
6. In order to review alleged errors occurring during the trial, such errors must be pointed out to the trial court in a motion for new trial and a ruling obtained thereon. *Kennedy v. State* 193
7. The purpose of a new trial is to enable the trial court to correct errors that have occurred in the conduct of the trial. *Sleezer v. Lang* 239
8. A new trial may be granted only for legal cause or reason and where it appears that a legal right has been invaded or denied. If legal cause or reason exists and the complaining party makes his application in writing within the time fixed by statute, the trial court has no discretion, and motion for new trial must be sustained. Otherwise it must be overruled. *Sleezer v. Lang* 239
9. A motion for a new trial in an equity suit is required only if a review is sought of rulings of the trial court on alleged errors occurring at the

trial, such as rulings on the rejection or reception of evidence. *Lindgren v. School Dist. of Bridgeport* 279

10. A motion for a new trial upon the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown. *Markey v. Hunter* 472

11. To support a motion for new trial, newly discovered evidence must be of such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result. *Markey v. Hunter* 472

Officers.

1. In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties. *Ludwig v. Board of County Commissioners* 600

2. When a public official has been guilty of negligence in fulfilling the duties of office imposed on him by law, he is liable for the costs of an action or proceeding brought to remedy the wrong. *Ludwig v. Board of County Commissioners* 600

3. The Attorney General of this state has no authority to waive the rights of the state in its property or to bind the state by consenting to its alienation. *Semrad v. Semrad* 911

Parties.

A decree for the partition of real estate in which the owner thereof is not made a party is absolutely void and it may properly be set aside at or after the term at which it was entered. *Semrad v. Semrad* 911

Partition.

1. Every person who buys from a referee takes with knowledge that the contract of sale is not binding on the referee until the entire transaction is properly presented to and approved by the court. *Michelson v. Wagner* 28

2. In partition proceedings it is the duty of referees and trial courts to endeavor to secure the highest possible price for property sold for the benefit of those persons lawfully entitled to the proceeds of the sale. *Michelson v. Wagner* 28

3. Substantially increased offers to a referee for property sold by him, made before confirmation

of the sale to the highest bidder, are sufficient evidence to support a finding of the trial court in the exercise of its judicial discretion that confirmation should be denied and a new sale ordered. *Michelson v. Wagner* 28

4. Objections to appointment of referee in partition on the ground of being biased or prejudiced against any party are addressed to the sound discretion of the court making the appointment, and a ruling thereon will not be set aside unless there is an abuse of discretion. *Phillips v. Phillips* 733
5. As between a partition in kind or sale of land for division, courts will favor partition in kind, since it does not disturb the existing form of inheritance or compel a person to sell his property against his will. *Phillips v. Phillips* 733
6. The burden is on those who seek a sale of the property in lieu of partition in kind to establish by a preponderance of the evidence the existence of a statutory ground for such sale. *Phillips v. Phillips* 733
7. A decree for the partition of real estate in which the owner thereof is not made a party is absolutely void and it may properly be set aside at or after the term at which it was entered. *Semrad v. Semrad* 911

Partnership.

1. A sale, conveyance, transfer, or assignment by a partner of his interest in the partnership to a copartner does not of itself dissolve the partnership, although the entire circumstances connected with such a transfer may be sufficient to bring about its dissolution. *Johnson v. Munsell* 749
2. Rule with respect to partner's conveyance of interest in partnership property operating as a dissolution of the partnership stated. *Johnson v. Munsell* 749
3. Upon dissolution of partnership by death of one of its members, the surviving partners may carry on same line of business without liability to account for good will. *Johnson v. Munsell* 749
4. In the absence of an agreement therefor, or of special circumstances, a surviving partner is not ordinarily entitled to compensation for his services in winding up and settling the partnership affairs. *Johnson v. Munsell* 749
5. Circumstances under which a surviving partner

is entitled to compensation for services stated. *Johnson v. Munsell* 749

Paupers.

1. There is no common-law liability upon a county to support poor and indigent persons. Any liability must arise by statute imposing such duty upon the county and prescribing the manner of its discharge. *Mary Lanning Memorial Hospital v. Clay County* 61
2. The county board of each county is the overseer of the poor and is vested, by statute, with the entire and exclusive superintendence thereof in such county, whether such poor persons be residents or nonresidents. *Mary Lanning Memorial Hospital v. Clay County* 61
3. Whether a person comes within the purview of the pauper statutes, so as to be entitled to the relief therein provided, is a question of fact to be determined by the county board in each particular case. *Mary Lanning Memorial Hospital v. Clay County* 61
4. An obligation against a county for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated by the statutes specifically providing the method for doing so. *Mary Lanning Memorial Hospital v. Clay County* 61

Penalties.

1. Where a statute imposes liability for actual damages and also imposes additional liability for the same act, such additional liability is a fine or a penalty. *Abel v. Conover* 926
2. A statute which provides for a penalty to be paid to the injured party is violative of the Constitution. *Abel v. Conover* 926
3. A statute providing for liquidated damages, though in the form of a penalty, will be upheld if the amount provided bears a reasonable relation to the actual damages which might be sustained, and if the damages are not susceptible of measurement by ordinary pecuniary standards. *Abel v. Conover* 926
4. Statute relating to deceit by an attorney, insofar as it provides for the recovery of treble the actual damages sustained by the injured party, is violative of the Constitution, in that it authorizes the recovery of a penalty by a private individual. *Abel v. Conover* 926

Pleading.

1. So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the petition may be changed and others added in order to cure imperfections and mistakes in the manner of stating the plaintiff's case. *Muenchau v. Swarts* 209
2. An amended pleading which amplifies, expands, clarifies, or elaborates with greater fullness of detail than was alleged in the original pleading does not state a new and different cause of action. *Muenchau v. Swarts* 209
3. A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or cure the defects. *Muenchau v. Swarts* 209
4. It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense. In such case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just. *Sleezer v. Lang* 239
5. If plaintiff's petition is prepared, signed, and verified by his attorney, and by mistake an erroneous statement is included therein, the trial court should before judgment, upon terms just and equitable to all parties, permit the litigant to withdraw that allegation. *Sleezer v. Lang* 239
6. Effect of admission in pleading upon which trial is had stated. *Sleezer v. Lang* 239
7. Force and effect of a pleading which has been superseded by an amended pleading stated. *Sleezer v. Lang* 239
8. It is within the discretion of the trial court to permit or refuse an amendment of a pleading during the trial of a case. Error cannot be predicated on the action of the court in reference thereto unless an abuse of discretion is established to the prejudice of the party who is adversely affected thereby. *Sleezer v. Lang* 239
9. Objections to claim filed in the county court against the estate of a deceased person will be construed with great liberality in the district court. *Dunbier v. Stanton* 541
10. A pleading of general settlement and payment of all claims and damages against an estate is not

inconsistent with a general denial. *Dunbier v. Stanton* 541
Dunbier v. Rafert 570
11. A defendant may plead as many grounds of defense as he may have, provided they are not so repugnant that if one be true another must be false. *Dunbier v. Stanton* 541
12. An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context. *Dunbier v. Stanton* 541
13. More than one defense may be interposed to the same cause of action, provided they are not inconsistent with each other; they are not inconsistent unless the proof of one necessarily disproves the other. *Dunbier v. Stanton* 541
Dunbier v. Rafert 570
14. Fraud or misrepresentation is generally a question of fact and to be sufficient as a cause of action or a defense must be pleaded by suitable allegations of fact from which it may be concluded. *Preferred Pictures Corp. v. Thompson* 694
15. A general charge of fraud or misrepresentation is a conclusion and presents no issue of fact. *Preferred Pictures Corp. v. Thompson* 694
16. The courts are without authority to grant relief on a patently invalid pleaded cause of action. *Blomquist v. Board of Educational Lands & Funds* 741

Poisons.

All persons who deal with deadly poisons or dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury from their use. *Rose v. Buffalo Air Service* 806

Public Lands.

The Board of Educational Lands and Funds under the leasing provisions of statute is without authority to sell directly or in effect a part of the fee. *Blomquist v. Board of Educational Lands & Funds* 741

Public Service Commissions.

1. An application to the railway commission for the transfer of valid intrastate operating rights from one common carrier to another is properly instituted under statutory provision for transfer of such rights. *Burlington Truck Lines, Inc. v. Brown Transfer* 331

2. An order of the railway commission granting an application to a trucking company to operate over alternate routes for convenience only does not authorize the carriage of freight other than that which can be transported on the regular route authority. *Burlington Truck Lines, Inc. v. Brown Transfer* 331
3. The Supreme Court will not disturb an order of the railway commission based on evidence unless the evidence shows that such order is unreasonable and arbitrary. *Burlington Truck Lines, Inc. v. Brown Transfer* 331
4. By the Constitution the powers and duties of the railway commission include the regulation of rates, service, and general control of common carriers as the Legislature may provide by law. *Block v. Lincoln Tel. & Tel. Co.* 531
5. In the absence of specific legislation the railway commission shall exercise the powers and perform the duties of regulation of rates, service, and general control of common carriers. *Block v. Lincoln Tel. & Tel. Co.* 531
6. Telephone companies operating in this state are subject to all reasonable orders of the railway commission entered upon hearings duly and legally had as to rates to be charged and time and manner of service to be rendered. *Block v. Lincoln Tel. & Tel. Co.* 531
7. One telephone company cannot invade the territory of another telephone company without making application to the railway commission and, after notice and hearing, receiving from the commission a certificate of convenience and necessity. *Block v. Lincoln Tel. & Tel. Co.* 531
8. The power of the railway commission to regulate common carriers is derived from the Constitution. Such power is plenary and self-executing in the absence of specific legislation. *Neuswanger v. Houk* 670
9. Where the Legislature enacts specific legislation implementing the Constitution, the railway commission is subject to and governed by the provisions of such enactment. *Neuswanger v. Houk* 670
10. The railway commission is clothed with legislative, administrative, and judicial powers. The Supreme Court has jurisdiction to review the orders and regulations of the commission on appeal. *Neuswanger v. Houk* 670

11. On an appeal to the Supreme Court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made. *Neuswanger v. Houk* 670

12. The railway commission may revoke, change, or suspend a certificate of public convenience and necessity for willful failure to comply with statute or lawful rules and regulations of the commission. *Neuswanger v. Houk* 670

13. The term "willful failure," as used in the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entering into and characterizing the failure complained of. *Neuswanger v. Houk* 670

14. Where an application is made for the transfer of operating rights under Motor Carrier Act, the question of whether or not such operating rights are dormant relates to the time the application is made, a hearing is held thereon, and for a reasonable length of time immediately prior thereto. *Neuswanger v. Houk* 670

15. Where a certificate of public convenience and necessity is not dormant, it may be transferred on approval of the railway commission under reasonable rules and regulations to be prescribed by it, if statutory requirements are met. *Neuswanger v. Houk* 670

16. Controlling questions stated in determining issue of public convenience and necessity in cases where new or extended operating rights are sought. *Neuswanger v. Houk* 670

Quieting Title.

1. The plaintiff in an action to quiet title to real estate has the burden of proof. He must recover upon the strength of his own title and not because of weakness in the title of his adversary. *Jones v. Schmidt* 351

2. A plaintiff who seeks to have title to real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. *Jones v. Schmidt* 351

Railroads.

1. The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment. It may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106
Union P. R. R. Co. v. State Board of Equalization & Assessment 139
2. It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof. Any substantial departure therefrom was a disregard of legislative mandate and constituted an arbitrary valuation and assessment of the property. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106
Union P. R. R. Co. v. State Board of Equalization & Assessment 139
3. It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual value. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106
Union P. R. R. Co. v. State Board of Equalization & Assessment 139
4. It is generally permissible for assessment authorities in ascertaining the value of the interstate operating property of a railroad for taxation purposes to consider its investment in transportation property determined, according to the rules of the Interstate Commerce Commission, in conjunction with other recognized methods of determining the value thereof. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106
5. The assessing authorities in determining the pro-

portion of the value of the entire operating property of an interstate railroad allocable to its interstate property in a single state may consider the percentage that the intrastate traffic units, gross earnings, car locomotive mileage, and current mileage bear to the total railroad system. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106

6. A computation of system value based upon average market price of stocks and bonds and also based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106

7. The capitalization by the State Board of Equalization and Assessment of the average net income of a railroad for a 5-year period immediately antecedent to the time of the assessment of the property of the railroad at the rate of 6 percent as one factor in ascertaining the value of the entire property of the railroad for taxation was not arbitrary or unreasonable. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106

8. A violation of a city ordinance regulating the speed of railroad trains is not negligence per se, but evidence of negligence which may be taken into consideration with all the other facts and circumstances in determining whether or not negligence is established thereby. *Carter v. Chicago, B. & Q. R. R. Co.* 438

9. Instruction upon effect of speed of railroad train approaching a crossing did not constitute prejudicial error. *Carter v. Chicago, B. & Q. R. R. Co.* 438

10. Where contributory negligence of a plaintiff is taken from the jury by an instruction, it is prejudicial error to give other instructions imposing a duty upon such plaintiff to exercise due precautions and to look where he could see and listen where he could hear an approaching train. *Carter v. Chicago, B. & Q. R. R. Co.* 438

Rape.

1. Where the accused in a rape case testifies as a witness on his own behalf and denies the charge, the testimony of the prosecutrix alone is not suffi-

cient to support a conviction. It must be corroborated by other evidence on material points. *Texter v. State* 426

2. Rule as to the sufficiency of evidence of corroboration in a rape case stated. *Texter v. State* 426

3. In a rape case, corroboration may consist of testimony of prosecutrix and others as to making complaint of the fact and nature of the offense. *Texter v. State* 426

Recognizances.

In a criminal case where a recognizance has been forfeited such forfeiture may be set aside upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. *State v. Seaton* 687

Robbery.

An individual attempts to perpetrate a robbery when he forcibly by violence or by putting in fear attempts to take from another or from his immediate possession or custody any money or personal property of value with intent to rob or steal. *Wilson v. State* 494

Sales.

1. As a general rule there is an entire failure of consideration where the property is entirely worthless, but there is not entire failure of consideration if the property has any substantial value, although less than the consideration paid. *Nathan v. McKernan* 1

2. Where there is a total failure of consideration and defendant has derived no benefit from the contract, or none beyond the amount of money which he has already advanced, such failure of consideration may be shown in bar of the action. *Nathan v. McKernan* 1

3. In an action upon a contract for the sale of chattels, evidence by the purchaser that after the delivery of the subject matter he inspected, retained, and used it as a whole, shows both an acceptance and a waiver of any objection that the quality was not such as the contract required. *Nathan v. McKernan* 1

4. Liability of manufacturer of chattel likely to cause

bodily harm or danger to property of another stated. *Rose v. Buffalo Air Service* 806

5. In order that the manufacturer of a chattel shall be subject to liability, it is not necessary that the chattel shall be one the use of which is intended to affect, preserve, or destroy human life. The purpose which the article, if perfect, is intended to accomplish is immaterial. The important thing is the harm which it is likely to do to persons or property if it is imperfect. *Rose v. Buffalo Air Service* 806
6. The manufacturer of dangerous substances is not an insurer. If he knows or in the exercise of reasonable care should know that if his product is used as directed or recommended it will cause or be likely to cause material injury, then he is liable to any person who in reliance upon his representations and directions uses the product for the purpose and in the manner directed and recommended and who suffers injury as a direct result. *Rose v. Buffalo Air Service* 806
7. The liability of a manufacturer rests upon the sound rule that a manufacturer or seller of an article inherently dangerous to life or property is liable for injury to the ultimate consumer who has purchased through a middleman. *Rose v. Buffalo Air Service* 806
8. Proof of actual knowledge that the product will be used by another than the purchaser is not required where the article is so made as to be inherently harmful. The manufacturer who puts the component parts together must be presumed to know the nature and quality of the resultant component which he solicits the public to purchase. *Rose v. Buffalo Air Service* 806

Schools and School Districts.

1. The refusal of a school district board to admit a nonresident pupil to its high school under the discretionary provision of the free high school education act does not operate as an estoppel upon the members of the board to appeal from a decree holding that the proceedings transferring lands belonging to the pupil's parents into such district are void. *Lindgren v. School Dist. of Bridgeport* 279
2. The granting of petitions by a county superintendent after notice and hearing, as provided by

statute relating to annexation of territory to a school district, need not be entered with the formality of a judgment of a court of law. The rendition of an order granting the petitions and an entry thereof at an appropriate time and place is all that is required. *Lindgren v. School Dist. of Bridgeport* 279

3. A valid order of a county superintendent, made pursuant to statute relating to annexation of territory to a school district, is final as to all matters properly determined by it, unless a review thereof is sought, and as to such matters it is not subject to collateral attack. *Lindgren v. School Dist. of Bridgeport* 279
4. The finding of a county superintendent, inherently contained in the grant of the petitions, that 55 percent of the voters of the district were signatory thereto, is a final determination of that fact unless a review thereof is sought, which may not be collaterally attacked unless it appears from the face of the petitions that they are void. *Lindgren v. School Dist. of Bridgeport* 279
5. The words "each district affected," contained in statute relating to annexation of territory to a school district, mean each school district in its entirety that is involved in the proceeding. *Lindgren v. School Dist. of Bridgeport* 279
6. The words "each district affected" do not refer to lands being transferred from one district to another, and no petition is required from the voters in the territory being detached from one district and annexed to another. *Lindgren v. School Dist. of Bridgeport* 279
7. When lands are transferred from one district to another under the provisions of statute relating to annexation of territory to a school district, the district from which the lands are detached retains its identity and the assets and unbonded obligations of such district by virtue of the specific provisions of such statute. *Lindgren v. School Dist. of Bridgeport* 279
8. Petitions initiated under statute for detaching lands from one district and annexing them to another do not require a provision specifying the disposition of assets and unbonded indebtedness, since such disposition is made by statute. *Lindgren v. School Dist. of Bridgeport* 279

9. The transfer of lands from one district to another, initiated by petitions signed by the required number of voters, and granted by the county superintendent after notice and hearing, and from which order a judicial review is available, meets all the requirements of due process. *Lindgren v. School Dist. of Bridgeport* 279
10. A voter and taxpayer of a school district has no interest in the tax funds of a district, lawfully collected, other than to see that they are used for the public purpose for which levied. *Lindgren v. School Dist. of Bridgeport* 279
11. The statutory provision that tax funds previously levied and collected shall remain the property of the district remaining after the proper transfer of a part of its lands to another school district is within the province of the Legislature, and is not inhibited by constitutional provisions. *Lindgren v. School Dist. of Bridgeport* 279
12. Mere irregularities in statutory proceedings to detach lands from one school district and annex them to another do not have the effect of vitiating the proceedings and subjecting them to collateral attack. *Lindgren v. School Dist. of Bridgeport* 279
13. Statutory provisions relating to mailing of notice do not require the service of personal notice upon the voters of the districts affected of the hearing by the county superintendent provided for in statute relating to annexation of territory to a school district. *Lindgren v. School Dist. of Bridgeport* 279

Statutes.

1. In determining whether legislation is valid, it is proper to examine and ascertain what may be done or accomplished pursuant to the legislation. *Summerville v. North Platte Valley Weather Control Dist.* 46
2. Legislation is invalid that authorizes and sanctions the taking of private property for public use without just compensation or that deprives persons of their property without due process of law. *Summerville v. North Platte Valley Weather Control Dist.* 46
3. The formation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, and the fixing of the boundaries are legislative functions. *Summerville v. North Platte Valley Weather Control Dist.* 46

4. The Legislature may authorize the organization of districts for public purposes by other governmental bodies, and the proceeding may be proposed or initiated by private individuals. *Summerville v. North Platte Valley Weather Control Dist.* 46
5. Where the organization of a district is authorized to be initiated by private individuals, there must be some provision for determining whether the particular district is for the public health, convenience, or welfare, and a means by which an aggrieved property owner, whose property is injuriously affected, may have his rights judicially determined. *Summerville v. North Platte Valley Weather Control Dist.* 46
6. The Legislature may not delegate legislative functions to private persons. *Summerville v. North Platte Valley Weather Control Dist.* 46
7. In the absence of an emergency, a legislative act takes effect 3 calendar months after the adjournment of the Legislature. *Summerville v. North Platte Valley Weather Control Dist.* 46
8. All statutes relating to the same subject should be construed and considered together for the purpose of giving effect to the legislative intent. *Mary Lanning Memorial Hospital v. Clay County* 61
9. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Dell v. City of Lincoln* 176
10. A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights. *Dell v. City of Lincoln* 176
11. Where the language used in a statute gives room for doubt or uncertainty as to its application, courts and administrative tribunals may resort to historical facts or general information to aid them in interpreting its provisions. *Ainsworth Irr. Dist. v. Bejot* 257
12. The construction of a statute of doubtful meaning given it by those whose duty it is to enforce it, and which construction the Legislature has by its continued noninterference for a number of years acquiesced in, will be approved, unless as thus construed it contravenes some provision of the Consti-

tution, or is clearly wrong. *Ainsworth Irr. Dist. v. Bejot* 257
13. Long continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law. *Ainsworth Irr. Dist. v. Bejot* 257
14. When a statute is ambiguous or susceptible of two constructions, one of which creates absurdities, unreasonableness, or unequal operation and the other of which avoids such a result, the latter construction should be adopted. *Ainsworth Irr. Dist v. Bejot* 257
15. Purpose and effect of allegedly conflicting provisions of Irrigation Act stated. *Ainsworth Irr. Dist. v. Bejot* 257
16. Two apparently conflicting sections of Irrigation Act are reconciled as to use of water in the same basin or watershed. *Ainsworth Irr. Dist. v. Bejot* 257
17. The general saving clause section relates to substantive and not to procedural law. *Lindgren v. School Dist. of Bridgeport* 279
18. The procurement of a bill of exceptions is a procedural matter and, when completed in accordance with a new statute after the effective date thereof, it is properly obtained under controlling law. *Lindgren v. School Dist. of Bridgeport* 279
19. Where a right has been created by a statute, which did not exist at common law, the Legislature may impose restrictions thereon, and the conditions so imposed qualify and limit the right and must be fully complied with in the manner prescribed. *County of Keith v. Creamer* 362
20. Constitutional provision requires that no bill shall contain more than one subject which subject shall be clearly expressed in the title. *State ex rel. Bottolfson v. School Board* 417
21. The title to an act of the Legislature must be such as to give reasonable notice of the general subject upon which it is proposed to legislate. *State ex rel. Bottolfson v. School Board* 417
22. The test of the validity of amendments of a statute is whether or not their provisions are germane to the provisions of the statute sought to be amended. *State ex rel. Bottolfson v. School Board* 417
23. The purpose of the constitutional provision limiting a legislative enactment to the object expressed in the title is to challenge the attention of those

affected by the provisions of the act and to prevent surreptitious legislation. *State ex rel. Bottolfson v. School Board* 417

24. The title of an act amending a former act of the Legislature may be looked to, as well as that of the original act, to ascertain if the amending act has any matter different from what is expressed in the title. *State ex rel. Bottolfson v. School Board* 417

25. Where the title of an amendatory or supplemental act sufficiently indicates the nature of the legislation in it contained, or the nature of the changes or additions by it made, it is immaterial whether or not the provisions of the act are covered by the title of the act amended or supplemented. *State ex rel. Bottolfson v. School Board* 417

26. In ascertaining the meaning of a statute, the court should discover the legislative intent from the language used. *Ludwig v. Board of County Commissioners* 600

27. If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature. *Ludwig v. Board of County Commissioners* 600

28. In considering the meaning and effect of a statute, the legislative intent must be discovered if possible from the language used considered in its plain, ordinary, and popular sense. *Ludwig v. Board of County Commissioners* 600

29. The Legislature is presumed to know the general conditions surrounding the subject matter of legislative enactment and the legal effect that accompanies the language it employs. *Ludwig v. Board of County Commissioners* 600

30. The terms "inhabitant" and "population" may have different meanings depending upon the context in which they are used. They may be used interchangeably or synonymously in a plain, ordinary, and popular sense. *Ludwig v. Board of County Commissioners* 600

31. The Legislature may not lawfully delegate legislative powers to an administrative or executive authority. *Lincoln Dairy Co. v. Finigan* 777

32. The exercise of a legislatively-delegated authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete

operation and enforcement of a law with designated limitations and standards, is not an exercise of legislative power. *Lincoln Dairy Co. v. Finigan* 777

33. The limitations of a legislatively-delegated authority and the standards by which the granted powers are to be administered must be clearly and definitely stated. They may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available. *Lincoln Dairy Co. v. Finigan* 777

34. The Legislature cannot delegate its power to create criminal offenses and prescribe penalties to an administrative or executive authority. Such powers are exclusively legislative and may not be delegated to the executive branch of government under the doctrine of the division of powers contained in the state Constitution. *Lincoln Dairy Co. v. Finigan* 777

35. The grant of power by the Legislature to the Director of the Department of Agriculture and Inspection to promulgate rules and regulations in general compliance with a model code, in accordance with his judgment or whim, the violation of which are made crimes subject to punishment, is an unconstitutional delegation of legislative power to an administrative authority. *Lincoln Dairy Co. v. Finigan* 777

36. A citizen has the constitutional right to engage in any occupation not detrimental to the public health, safety, and welfare. Measures adopted by the Legislature under the police power to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. *Lincoln Dairy Co. v. Finigan* 777

37. Where it appears that a statute, under the guise of police regulation, does not tend to preserve the public health, safety, and welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an unwarranted interference with or an encroachment upon the property rights of the individual. *Lincoln Dairy Co. v. Finigan* 777

38. The Legislature has the power to prohibit the sale of food products that are dangerous or harmful to public health but it cannot prohibit the sale of a wholesome and nutritious food product that is not a fraud upon the public. *Lincoln Dairy Co. v. Finigan* 777

39. Grade A milk statute was unconstitutional in three respects noted. *Lincoln Dairy Co. v. Finigan* 777

40. The 1955 amendments to Blue-Sky Law created a specific remedy which did not exist at common law. As a general rule statutes will not be understood as effecting any change in the common law beyond what is clearly indicated. Statutes in conflict with the common law must be strictly interpreted. *Davis v. Walker* 891

Subscriptions.

1. The assumption of an obligation, express or implied, by a university to keep an endowment fund intact and to use the income thereof for the payment of scholarships for worthy girls, is a sufficient consideration for a subscription to such fund in the form of a promissory note payable at the maker's death. *Nebraska Wesleyan University v. Estate of Couch* 518
2. The assumption of an obligation may be implied from the acceptance and retention of a subscription contract by the donee. *Nebraska Wesleyan University v. Estate of Couch* 518
3. Conditions and restrictions contained in or endorsed upon a subscription note, not inconsistent with the subscription contract and which were accepted by the donee, do not have the effect of destroying the original consideration for the contract. *Nebraska Wesleyan University v. Estate of Couch* 518

Taxation.

1. An appeal from an assessment of railroad property by the State Board of Equalization and Assessment is required to be considered and decided de novo on the record presented to the Supreme Court. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77

   Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106

   Union P. R. R. Co. v. State Board of Equalization & Assessment 139
2. The Legislature has not defined a specific method by which railroad property in the state shall be valued for taxation by the State Board of Equalization and Assessment. It may, within legal limitations and restrictions, resort to any appropriate method by which a reasonable and just determination of actual value of such property can be ascertained.

Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment 77
Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106
Union P. R. R. Co. v. State Board of Equalization & Assessment 139

3. Presumption of validity of actions of an assessing authority for taxation purposes disappears if there is evidence to the contrary. Thereafter the matter is one of fact to be decided from evidence, unaided by presumption. The burden of establishing an illegal assessment is upon the complaining party. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment 106
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4. It was the duty of the State Board of Equalization and Assessment in 1959 to value railroad property in the state at its actual value and to assess it at 35 percent thereof. Any substantial departure therefrom was a disregard of legislative mandate and constituted an arbitrary valuation and assessment of the property. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
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5. A formula for determining the value of tangible property for taxation purposes must be appropriate to produce the result required by statute; and if an arbitrary basis is used which is not uniformly applied to all tangible property, the result is an arbitrary one and will not sustain a valuation for taxation purposes. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
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6. It is an unlawful discrimination, prohibited by the Constitution and the statutes of the state, to assess the property of a railroad at 47½ percent of its actual value when all other tangible property is assessed at not more than 35 percent of its actual

value. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
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7. Taxing authorities may not withdraw any property from the principle of uniformity of taxation as provided by the Constitution and statutes of the state. One owner of property cannot be compelled to pay a greater proportion of taxes according to the value of his property than another property owner of the same class is required to pay. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
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8. It is generally permissible for assessment authorities in ascertaining the value of the interstate operating property of a railroad for taxation purposes to consider its investment in transportation property determined, according to the rules of the Interstate Commerce Commission, in conjunction with other recognized methods of determining the value thereof. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106

9. The assessing authorities in determining the proportion of the value of the entire operating property of an interstate railroad allocable to its interstate property in a single state may consider the percentage that the intrastate traffic units, gross earnings, car locomotive mileage, and current mileage bear to the total railroad system. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106

10. A computation of system value based upon average market price of stocks and bonds and also based upon a capitalization of net earnings reflect the effect, upon actual value, of obsolescence, of the competition of other means of transportation, and of all factors affecting earnings. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106

11. The capitalization by the State Board of Equalization and Assessment of the average net income of a railroad for a 5-year period immediately antecedent

to the time of the assessment of the property of the railroad at the rate of 6 percent as one factor in ascertaining the value of the entire property of the railroad for taxation was not arbitrary or unreasonable. *Chicago & N. W. Ry. Co. v. State Board of Equalization & Assessment* 106

12. A voter and taxpayer of a school district has no interest in the tax funds of a district, lawfully collected, other than to see that they are used for the public purpose for which levied. *Lindgren v. School Dist. of Bridgeport* 279
13. The statutory provision that tax funds previously levied and collected shall remain the property of the district remaining after the proper transfer of a part of its lands to another school district is within the province of the Legislature, and is not inhibited by constitutional provisions. *Lindgren v. School Dist. of Bridgeport* 279
14. One who concludes that his property has been excessively valued for taxation must apply to the county board of equalization to correct the error and, in case of an adverse determination, appeal therefrom. *Scudder v. County of Buffalo* 293
15. Statutory remedy of appeal from order of county board of equalization is full, adequate, and exclusive. *Scudder v. County of Buffalo* 293
16. Where property is excessively valued for taxation, or if prejudicial errors and irregularities intervened in the procedure of the county board of equalization, the statute affords a plain, adequate, speedy, and exclusive remedy which cannot be collaterally attacked unless the assessment or some part thereof is wholly void. *Scudder v. County of Buffalo* 293
17. A void assessment may be enjoined. Knowledge of the proceedings will not estop landowner from contesting void assessment. *Shanahan v. Johnson* 399

Telecommunications.

1. Within the meaning of the Constitution, telephone companies are common carriers. *Block v. Lincoln Tel. & Tel. Co.* 531
2. Telephone companies operating in this state are subject to all reasonable orders of the railway commission entered upon hearings duly and legally had as to rates to be charged and time and manner of service to be rendered. *Block v. Lincoln Tel. & Tel. Co.* 531

3. One telephone company cannot invade the territory of another telephone company without making application to the railway commission and, after notice and hearing, receiving from the commission a certificate of convenence and necessity. *Block v. Lincoln Tel. & Tel. Co.* 531
4. A subscriber to telephone service directly affected is a party in interest in a hearing to determine whether or not, on the basis of convenience and necessity, his existing service shall be taken away. *Block v. Lincoln Tel. & Tel. Co.* 531

Tender.

Where a tender is made upon condition that it be accepted in full satisfaction of a demand, it must be accepted or refused as made. If accepted, the condition is accepted notwithstanding protest to the contrary. *Dunbier v. Stanton* 541

Trial.

1. In an action for damages for loss of future earnings it is the duty of the court to instruct the jury that the amount thereof shall be reduced to present worth or value. *Patras v. Waldbaum* 20
2. In the absence of request the court is not required to instruct as to a basis for determination of present worth or value of future damages. *Patras v. Waldbaum* 20
3. If the court either on request or on its own motion attempts to define a method of arriving at present worth or value of future damages, and the instruction fails to contain a legal or comprehensive definition, it is prejudicially erroneous. *Patras v. Waldbaum* 20
4. Photographs are admissible in evidence where they may be regarded as instructive upon a question for determination, but if they are not so instructive it is error to admit them. *Patras v. Waldbaum.* 20
5. If the evidence is undisputed, or such that minds of men could not reasonably arrive at any other conclusion, the question is one for decision by the court as a matter of law; otherwise, it is a question for the jury to decide as other issuable facts in the case. *Sunderman v. Wardlaw* 70
6. Presumption of validity of actions of an assessing authority for taxation purposes disappears if there is evidence to the contrary. Thereafter the matter

is one of fact to be decided from evidence, unaided by presumption. The burden of establishing an illegal assessment is upon the complaining party. *Chicago, B. & Q. R. R. Co. v. State Board of Equalization & Assessment* 77
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7. A motion for judgment notwithstanding the verdict must, for the purpose of decision thereon, be treated in the light most favorable to the party against whom the motion is directed. *Warren v. Bostock* 203
8. When the evidence is in conflict as to what negligence, if any, constituted the proximate cause of the injury, the determination of the proximate cause is for the jury. *Warren v. Bostock* 203
9. It is within the discretion of the trial court to permit or refuse an amendment of a pleading during the trial of a case. Error cannot be predicated on the action of the court in reference thereto unless an abuse of discretion is established to the prejudice of the party who is adversely affected thereby. *Sleezer v. Lang* 239
10. To predicate error upon misconduct of counsel in addressing the jury, objection must have been properly made at the time or at the conclusion of counsel's statement or argument, and ruling had before submission of the case to the jury. *Haines v. State* 304
11. A prosecutor, in argument to the jury, may state proper conclusions which are predicated upon competent evidence which will be or has been adduced. Unless an error in argument complained of was prejudicial to the rights of defendant, the judgment should not be reversed. *Haines v. State* 304
12. Where the evidence on the trial in the district court is not conflicting and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion. *Vermaas v. Heckel* 321
13. Where different minds may reasonably draw different conclusions from the evidence adduced or if there is a conflict in the evidence as to whether or not it establishes negligence or contributory

negligence, and the degree thereof when one is compared with the other, such issues must be submitted to the jury. *Vermaas v. Heckel* 321

14. If the evidence in reference thereto is such that various inferences may properly be deduced therefrom as to the degree of the crime, the trial court must submit the different degrees to the jury to determine which inference shall prevail. *Clown Horse v. State* 336

15. It is the duty of the district court to instruct the jury on such degree or degrees of homicide as are supported by evidence sufficient to sustain a verdict of guilty. *Clown Horse v. State* 336

16. Duty of trial court in instructing jury in criminal case is stated. Failure to charge upon some particular phase of the case is not error in the absence of a proper request. *Kucera v. State* 368

17. A change in testimony by a litigant to meet the exigencies of the case is discredited as a matter of law and should be disregarded. *Nichols v. McArdle* 382

18. The trial court is required to submit to the jury the issues of fact presented by the pleadings and supported by evidence. The failure to do so is prejudicial error. *Nichols v. McArdle* 382

19. Where contributory negligence is pleaded as a defense, but there is no competent evidence to support such defense, it is prejudicial error to submit that issue to the jury. *Carter v. Chicago, B. & Q. R. R. Co.* 438

20. Conflicting instructions are erroneous and they are prejudicial unless it is apparent from the record that the jury was not misled thereby. *Carter v. Chicago, B. & Q. R. R. Co.* 438

21. Instructions are to be considered together, to the end that they may be properly understood, and, if as a whole they fairly state the law applicable to the evidence when so construed, error cannot be predicated on the giving thereof. *State v. Albert* 478

22. The failure of a party to call an available witness may impair the value of his proof, but the probative force of any inference therefrom is for the triers of fact. *Dunbier v. Stanton* 541

23. Triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. Circumstantial evi-

dence is equally competent with direct testimony. *Dunbier v. Stanton* 541

24. Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. *Dunbier v. Stanton* 541

25. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false. *Dunbier v. Stanton* 541

26. If there is evidence to sustain a finding for the litigant having the burden of proof, the trial court may not disregard it and decide the case as a matter of law. *Ripp v. Riesland* 631

27. Where a litigant requests different and antagonistic instructions, he cannot complain of the action of the trial court in giving one of such instructions. *Ripp v. Riesland* 631

28. In a negligence action concerning a collision of automobiles at a highway intersection, the jury should be fully and precisely instructed as to the reciprocal rights and duties of the operators of the automobiles. *Ripp v. Riesland* 631

29. Duty of making comparison under the comparative negligence statute is placed on the jury. There is no burden of proof on either litigant. *Ripp v. Riesland* 631

30. A conviction may rest on the uncorroborated testimony of an accomplice when, considered with all the testimony and circumstances, it satisfies the jury beyond a reasonable doubt of the guilt of the accused. *Jungclaus v. State* 704

31. Where a cautionary instruction on the weight and credibility of the testimony of an accomplice is requested, it is reversible error for the trial court to refuse to give such an instruction. *Jungclaus v. State* 704

32. Rule as to sufficiency of evidence to require submission of case to jury stated. *Parsons Constr. Co. v. Metropolitan Utilities Dist.* 709

33. A party to an action is entitled to have the jury instructed with reference to his theory of the case,

when the pleadings present the theory as an issue and it is supported by competent evidence, whether requested to do so or not. *Vontress v. Ready Mixed Concrete Co.* 789

34. Where the pertinent facts pertaining to a contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court. *Vontress v. Ready Mixed Concrete Co.* 789

35. In considering a motion for summary judgment the court should view the evidence in the light most favorable to the party against whom it is directed. *Fidelity & Deposit Co. v. Bodenstedt* 799

36. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. *Fidelity & Deposit Co. v. Bodenstedt* 799

37. A court examines the evidence on motion for summary judgment, not to decide any issue of fact presented, but to discover if any real issue of fact exists. *Fidelity & Deposit Co. v. Bodenstedt* 799

Trusts.

1. To establish a resulting trust the evidence must be clear, satisfactory, and convincing. *Bailey v. Karnopp* 836

2. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. *Bailey v. Karnopp* 836

United States.

A United States savings bond registered in the names of two persons as co-owners may be paid to either co-owner upon his separate request, and upon payment the other co-owner ceases to have any interest in the proceeds of the bonds. *Dunbier v. Rafert* 570

Venue.

A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of such discretion is disclosed. *Jungclaus v. State* 704

Waters.

1. The Department of Water Resources has exclusive original jurisdiction to hear and adjudicate all matters pertaining to water rights, appropriations, and priorities for the use of public waters of this state for irrigation. *Ainsworth Irr. Dist. v. Harms* 228
2. Purpose and effect of allegedly conflicting provisions of Irrigation Act stated. *Ainsworth Irr. Dist. v. Bejot* 257
3. Two apparently conflicting sections of Irrigation Act are reconciled as to use of water in the same basin or watershed. *Ainsworth Irr. Dist. v. Bejot* 257
4. A plaintiff who seeks to have title to real estate quieted in him on the ground that it is accretion to land to which he has title has the burden of proving the accretion by a preponderance of the evidence. *Jones v. Schmidt* 351
5. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. *Jones v. Schmidt* 351

Wills.

1. A devise which conveys property in fee simple, to which are attached conditions for the violation of which a forfeiture may be declared by contingent devisees, creates an estate in fee simple subject to conditions subsequent. *Erskine v. Board of Regents* 660
2. Conditions subsequent contained in a devise of real estate will be construed most strongly against contingent devisees and a forfeiture will not be enforced unless clearly established. *Erskine v. Board of Regents* 660
3. To constitute a breach of condition subsequent in a devise relating to maintenance or use of the land conveyed, there must be such neglect to comply as to indicate an intention to disregard the condition. *Erskine v. Board of Regents* 660
4. It is not enough to show that the letter of a condition subsequent is violated; it must appear that its true spirit and purpose have been intentionally disregarded by the devisee. *Erskine v. Board of Regents* 660

Witnesses.

1. Rule as to the effect of contradictory statements of a witness made out of court stated. *Texter v. State* 426
2. A party to an action is not an incompetent witness by whom to prove a transaction or conversation had with an agent of the other party thereto since deceased. *Preferred Pictures Corp. v. Thompson* 694
3. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true. *Johnson v. Munsell* 749
4. Where evidence of a witness' prior evaluation of certain property, inconsistent with his present estimate, is introduced, the witness may explain the circumstances of his former evaluation and state why he now testifies differently. *Peters v. Woodman Accident & Life Co.* 861

Workmen's Compensation.

1. An action for workmen's compensation may be maintained in this state where accidental injuries are sustained in this state by an employee of a nonresident employer except against railroad companies engaged in interstate commerce. *Rapp v. Hale* 620
2. Conditions stated under which an award of compensation by the workmen's compensation court can be set aside by the district court. *Rapp v. Hale* 620
3. Where a retrial has been had before the full compensation court the appeal to the district court is limited in scope and is primarily in the nature of an error proceeding. *Rapp v. Hale* 620
4. On an appeal from the district court to the Supreme Court in a workmen's compensation case, the case shall be considered de novo except where the findings of fact are conclusively supported by the evidence as disclosed by the record. *Rapp v. Hale* 620
5. Total disability for workmen's compensation purposes is defined. *Rapp v. Hale* 620
6. A workman who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. *Rapp v. Hale* 620

7. Disability within the meaning of the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. *Rapp v. Hale* 620